Supreme Court of the United States

OCTOBER TERM, 1963

No. 386

FEDERAL POWER COMMISSION, PETITIONER

vs.

TEXACO INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 7217

TEXACO INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION TO REVIEW AND SET ASIDE ORDERS OF THE FEDERAL POWER COMMISSION—Filed February 25, 1963

The The Honorable United States Court of Appeals For The Tenth Circuit:

Texaco Inc., hereinafter called "Petitioner" or "Texaco," pursuant to Section 19(b) of the Natural Gas Act of 1938, as amended, 52 Stat. 831, 15 U.S.C. § 717, *et seq.*, (Act), files this Petition to Review and Set Aside Orders of the Federal Power Commission, hereinafter called "Respondent" or "Commission," issued October 5, 1962 and November 30, 1962. Petitioner advances the following grounds:

I.

NATURE OF THE PROCEEDINGS

This proceeding involves one more tile in the mosaic of illegalities surrounding the issuance and application of Respondent's Order Nos. 232, 232A and 242 [1] to Texaco and other independent producers of natural gas who are subject to Respondent's jurisdiction. By its order of

[1] Copies of these orders are attached hereto as Exhibit A.

October 5, 1962, Respondent rejected Texaco's proposed rate schedule (contract) and the related application for certificate of public convenience and necessity by which Petitioner sought to initiate sales of natural gas in [fol. 2] interstate commerce to Natural Gas Pipeline Company of America (Natural). Respondent's rejection is bottomed on its conclusion that Texaco's contract with Natural contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's regulations. The regulations referred to are the embodiment of the aforesaid Order Nos. 232, 232A and 242. Petitioner institutes review of this order of rejection because it is aggrieved by the implementation of orders which exceed the authority of the Respondent under the Act. Although Petitioner has sought through rehearing to prompt the Respondent to rectify its illegal actions, by order of November 30, 1962, Respondent has rejected these pleas.

II.

JURISDICTION AND VENUE

1. Texaco is a corporation organized under the laws of the State of Delaware. Texaco's Tulsa Division is located and has its headquarters office in Tulsa, Oklahoma. The Tulsa Division has direct and complete cognizance over the sale of Texaco's gas which is produced in the Camrick Southeast Field, Beaver County, Oklahoma.

The Tulsa Division with its Manager and approximately 750 employees in the States of Oklahoma and Kansas is responsible for the full spectrum of Texaco producing activities and operations in an area including those two states. Significantly, 99.8% of the gas produced under the Tulsa Division's cognizance is produced and sold in Oklahoma and Kansas. Operations conducted from Tulsa include the negotiation of leases and exploration permits; geological and geophysical activities; the drilling of exploratory wells, and the development of productive areas; the payment of royalties and production taxes; the filing of State reports and the disposition of the pro-

duction. Hence, the full management, administration and supervision over the oil and gas leases within its territorial boundaries, including the lease affected by the order presented for review, falls to this Division.[2]

[fol. 3] The contract of May 1, 1962 with Natural was negotiated by executives and personnel of the Tulsa Division in Tulsa, Oklahoma. It covers the sale of gas produced by Texaco only from its properties in the Camrick Southeast Field, Beaver County, Oklahoma, and title to this gas passes to Natural in Oklahoma. The performance of this twenty (20) year contract is under the supervision of the Tulsa Division. All records and accounts relating to this sale, as well as other sales of Texaco's gas produced in Oklahoma are maintained and administered in Tulsa, Oklahoma, payment for gas received is made to the Tulsa Division, and notice concerning this sale must be made to the Tulsa Division.

The filings with the Federal Power Commission required by Sections 4 and 7 of the Natural Gas Act before the sale of Texaco's Camrick Southeast gas could be commenced in interstate commerce were made by the Tulsa Division and executed by its Division Manager.

Thus, as a result of the activities and operations of its Tulsa and Denver Divisions and specifically the cognizance of the Tulsa Division over this sale of gas which is subject to the Commission's orders herein complained of, and the location of the properties affected by the orders here for review, Texaco is located within the Tenth Circuit within the meaning of Section 19(b) of the Natural Gas Act.

2. Respondent is a public body known as the Federal Power Commission, originally created pursuant to the Act of June 10, 1920, 41 Stat. 1063, and organized as an independent commission by the Act of June 23, 1930, 46 Stat. 797. The present members of said Commission are Joseph C. Swidler, Chairman, L. J. O'Connor, Jr., Howard Morgan, Charles R. Ross, and Harold C. Wood-

[2] Another of Texaco's seven Producing Department Divisions has its headquarters office in Denver, Colorado and it conducts activities similar to those conducted from Tulsa for an area which includes the States of Colorado, New Mexico, Utah and Wyoming.

ward, and its principal office is at 441 G Street, Northwest, Washington 25, D. C.

3. Section 19(b) of the Natural Gas Act and the provisions of Section 10 of the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C.A. § 1009, confer jurisdiction upon this Court to review the orders of the Federal Power Commission herein complained of and by which Texaco is aggrieved.

4. This petition is filed with this Court within sixty (60) days after November 30, 1962, the date upon which the Respondent denied Texaco's application for rehearing.

[fol. 4] III.

STATEMENT OF THE CASE

On May 1, 1962, Texaco, a natural gas company and an independent producer as defined in Section 154.91(a) of the Respondent's Regulations under the Natural Gas Act, 18 CFR § 154.91(a), agreed to sell, and Natural Gas Pipeline Company of America, a pipeline company engaged in the interstate transmission of natural gas, agreed to purchase certain quantities of gas produced by Texaco from its properties in the Camrick Southeast Field, Beaver County, Oklahoma. The contract between Texaco and its purchaser covers the disposition of natural gas production from this field for a period of approximately twenty (20) years. During the negotiation sessions, the parties hammered out a contract[3] (Appendix, pp. 13-46) designed to delineate the duties and enumerate the rights of the respective parties over the protracted sales period. The negotiators gave particular attention to the construction of the pricing provisions (Appendix, pp. 37-38) since the prices derived thereunder would bind and limit the parties through the years of sales—or thereafter until 1982 (Appendix, p. 43).

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[3] Concurrently with this Petition for Review, Texaco has filed a Motion requesting limited consolidation and other procedural rulings. Attached to that Motion is an Appendix containing the documents which constitute the record in these matters. Certain references are given to that Appendix in this Statement.

Thus, while the May 1, 1962 contract between Texaco and Natural spelled out an initial price, governing first deliveries, it also provided for certain specific price increases at the last three of the four five-year periods into which the contract term is divided:

> ". . . the agreement shall be divided into four (4) five (5) year periods; . . . The price for gas delivered during the first period . . . shall be seventeen (17) cents; the price for gas delivered during the second period shall be eighteen and one-half (18½) cents; . . . during the third period . . . twenty (20) cents; . . . during the fourth period . . . twenty-one and one-half (21½) cents.". (Appendix, p. 37)

However, Article X, the pricing provision, also took cognizance of the uncertainties of the market during such a long sales commitment as was contemplated by the [fol. 5] contract. It, therefore, provided limited price renegotiation rights (Appendix, p. 38). Price renegotiation is to be undertaken six months prior to the beginning of the third (1972)[4] and fourth (1977)[5] five-year contract periods. The renegotiated price is to be determined on the basis of the average of the highest prices being paid without condition of authorization by the three (other than Natural) interstate pipelines for purchases of natural gas they are making at the time of the renegotiation from fields wholly or partly within Beaver and Texas Counties, Oklahoma. Appropriate adjustments are to be made to insure that prices to be used for comparison purposes cover the delivery and the receipt of gas under conditions comparable to the sales by Texaco to Natural under the May 1, 1962 contract. The contract provides that the renegotiated price will not apply if it is less than the price specified as applicable for the particular five-year period (Appendix, p. 38).

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[4] and [5] These dates may be moved back somewhat since Article XVI gears the contract term and the contract periods to "the first day of the month following the first delivery of gas under this Agreement." (Appendix, p. 43) Because of Respondent's actions here for review, Texaco therefore has been precluded from initiating sales.

Under cover of its letter of August 27, 1962, and as required by Section 4(c) of the Natural Gas Act, 15 U.S.C. § 717(c), and Respondent's procedural Regulations, Texaco submitted the contract of May 1, 1962 to the Respondent for filing (Appendix, p. 9). Concurrently, and pursuant to Section 7 of the Act, 15 U.S.C. § 717(f), Texaco filed its Application for a certificate of public convenience and necessity (Appendix, p. 1). Included in the application was Texaco's sworn invocation of Respondent's Regulation on Temporary Authorizations, 18 C.F.R. § 1[illegible]28, by which Texaco notified the Commission that sales by producers on offsetting properties* were causing migration of gas and drainage from Texaco's leases (Appendix, p. 3).

Respondent not only did not authorize Texaco's temporary sales which would stop the gas migration but, by its order of October 5, 1962, the Commission rejected both Texaco's rate schedule filing and its certificate application (Appendix, p. 50). The order stated, *inter alia:*

[fol. 6] "A review of the contract discloses that it contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's regulations. Therefore, in accordance with Commission Order No. 242, issued February 8, 1962 . . . and Section 154.100 of the regulations, the proposed rate schedule and related certificate application are hereby rejected. All available copies are returned herewith."

The provisions of Section 154.93 referred to in the October 5 order are the product of Respondent's Order Nos. 232, 232A and 242. Order No. 232 was issued on March 3, 1961, and declared several types of common natural-gas-contract price clauses (including clauses such as Texaco's renegotiation privilege with Natural) to be "inoperative and of no effect at law" in contracts tendered for filing after April 2, 1961. Objections to this

* Respondent's public files show that there are some thirty-one other producers in the Camrick Southeast Field selling natural gas production under some seventy-two contracts with renegotiation clauses similar to that contained in the May 1, 1962 contract.

action were filed by Texaco and numerous other producers, and on March 31, 1961 the Commission amended its Order No. 232 by issuing Order No. 232A which did little to modify the harsh and illegal action of the earlier order.

By Order No. 232A the Commission added the following amendment to the definition of a "rate schedule" in Section 154.93 of its Regulations:

> "*Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:
>
> (1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
>
> (2) provisions that change a price to a specific amount at a definite date; and,
>
> (3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question."

[fol. 7] This amendment was effective April 3, 1961, and thereafter the Commission invoked the provisions of this new Regulation as a basis for conditioning temporary and permanent producer certificates by voiding contract provisions other than "permissible provisions." See *Texaco Inc.* v. *Federal Power Commission*, Nos. 6947 and 7135, pending.

On October 10, 1961, Respondent issued notice of further amendments which it proposed to Section 154.93 and other sections of the Regulations. On February 8, 1962,

disregarding the protests filed by Texaco and others, Respondent issued Order No. 242. This promulgation provided for the outright rejection of contracts, together with their related certificate applications, if "price-changing provisions other than the permissible provisions" are negotiated by the parties and included in the contracts.

It was the Regulations resulting from this series of Commission orders which Respondent invoked in the October 5 order as support for its rejection of Texaco's filings.

On November 1, 1962, following the procedures provided by Section 19(a) of the Natural Gas Act, and the applicable procedural rules of the Respondent, Texaco duly filed an application for rehearing of the October 5 rejection (Appendix, pp. 54-60).

In its application, Texaco pointed out to the Commission that its rejection of Texaco's rate schedule and certificate application was arbitrary, capricious, and discriminatory and far in excess of the authority of the Commission under any provisions of the Act. The Regulations cited by the Commission as the basis for its action were also illustrated to be illegal and arbitrary. However, by order of November 30, 1962, the Commission ignored the arguments advanced by Texaco on application for rehearing and denied relief or rehearing (Appendix, p. 62).

Respondent's grounds for denying rehearing are its reaffirmance of its attempts through so-called rulemaking proceedings to set aside decisions of the United States Supreme Court and to in effect amend the Natural Gas Act.

This petition is filed within sixty (60) days after the order of November 30, 1962 as required by Section 19(b) of the Act.

[fol. 8]

IV.

GROUNDS ON WHICH RELIEF IS SOUGHT

Texaco reiterates here, and seeks review and relief on the grounds which it pressed upon the Respondent in its application for rehearing, but which were there ignored.

The Commission order of October 5, 1962, and the order of December 1, 1962 therein sought implementation of the Commission's Order Nos. 232, 232A and 242 and are thus erroneous and illegal because:

A. The summary rejection, without notice of hearing of Texaco's application for a certificate of public convenience and necessity, is a violation of Section 7(c) of the Natural Gas Act.

B. The rejection is also violative of Sections 4 and 5 of the Act which prohibit summary proceedings.

C. The Commission's order of October 5, 1962, is not supported by substantial evidence and findings in the record before the Commission as required by Constitutional due process provisions, the Natural Gas Act and the Administrative Procedure Act.

D. The order of October 5, 1962 is unreasonable, arbitrary, capricious, and discriminatory as to Texaco in light of Texaco's rights under the Natural Gas Act and the Commission's treatment of other natural gas companies.

E. The Commission's order of October 5, 1962, rejecting Texaco's application for a certificate of public convenience and necessity, and Texaco's proposed rate schedule, is unlawful because it is based on illegal Regulations. The order of October 5, 1962 rejected Texaco's application and its rate schedule because the contract contained pricing provisions other than those directed by Section 154.93 of the Commission's Regulations and because, under Section 154.100 of the Commission's Regulations (and its Order No. 242), any contracts executed on or after April 2, 1961 containing other than the permitted price provisions are to be rejected.

The portions of the Commission's Regulations relied upon for the rejection of Texaco's filings were adopted as the result of separate orders of the Commission issued without any evidentiary hearing regarding the necessity, [fol. 9] propriety or lawfulness of such regulations. The orders initiating the changes in Regulations were entered over the written protests of Texaco and other producers, both before the Commission and before the courts.

The Orders and the Regulations promulgated in accordance with Order Nos. 232, 232A and 242, relied upon by the Commission, and enforced by the Order of October 5, 1962 are themselves unlawful for each of the following reasons:

(1) They exceed the authority delegated to the Commission under the terms of the Natural Gas Act in that they are neither necessary nor appropriate to the administration of the Act.

(2) These regulations totally circumvent the statutory scheme set forth by Congress in the Natural Gas Act and recognized by the Supreme Court in its decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co.* v. *Memphis Gas, Light & Water Division*, 358 U.S. 103 (1958). They deprive Texaco and its purchaser of the statutory and Constitutional right to establish the terms, provisions and conditions under which natural gas is to be sold in interstate commerce for resale, subject only to the review powers granted the Commission.

(3) Order Nos. 232, 232A and 242 are in direct violation of the Natural Gas Act itself in that Sections 4, 5 and 7 of the Natural Gas Act provide the standards under which rate filings are to be reviewed and certificate applications are to be considered.

(4) They are violative of the provisions of Sections 5 and 7 of the Administrative Procedure Act.

(5) They are in violation of the Fifth Amendment to the Constitution of the United States in that they deprive Texaco of due process of law.

(6) They are unreasonable, arbitrary and capricious.

(7) They are discriminatory and arbitrary, and therefore unlawful, in that their application will, as in this case, permit other sellers of gas from the same field to have and employ pricing provisions which have been denied to Texaco.

[fol. 10] (8) They are arbitrary and capricious in that they are discriminatory against Texaco in the light of regulation permitting indefinite price filings by other natural gas companies.

(9) They amount to a prejudgment of the lawfulness of the rates which might be filed in the future and preclude such filing and the right to test the lawfulness thereof.

WHEREFORE, Petitioner, Texaco Inc., respectfully requests:

(a) That a certified copy of this petition to review be forthwith served upon Respondent;

(b) That the Respondent be required to certify to this Court the record of the proceeding wherein the orders here sought to be reviewed were entered;

(c) That the proceedings, findings, conclusions and Orders be reviewed by this Court and that the Respondent's rejection and underlying Orders be set aside and that Respondent be ordered to accept Texaco's filings.

(d) That this Court grant to Petitioner such other and further relief as is required in the premises.

Respectfully submitted:

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By /s/ Alfred C. DeCrane, Jr.
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Of Counsel

December 3, 1962
Houston, Texas

[fol. 11] EXHIBIT A

FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and Paul A. Sweeney.

Docket No. R-153

Nonacceptability of Contracts Between Producers and Interstate Natural-gas Companies Containing Certain Types of Automatic Escalation and Favored Nation Clauses

(18 CFR 154.91(a) and 154.93)

ORDER No. 232

AMENDING THE COMMISSION'S GENERAL RULES AND REGULATIONS

(Issued March 3, 1961)

In this proceeding, the Commission has under consideration a proposed amendment of § 154.93 of its General Rules and Regulations (18 CFR 154.93) respecting the filing of rate schedules containing certain provisions for adjustments in the price of the seller, e.g., "favored-nation", "redetermination", and "spiral escalation" clauses.

General public notice of this proposed rule-making was given by publication in the Federal Register on April 12, 1956 (21 FR 2388) and mailing notices to interested parties, including State and Federal regulatory agencies.[1]

In response to such notice, numerous suggestions and comments were submitted by interested parties respecting the changes in the Commission's rules therein proposed. All such suggestions and comments have been carefully

[1] This issue was also fully tried, briefed, and argued before the Commission in *The Pure Oil Company*, Docket No. G-17930, in which decision is being issued this day.

considered, but, for reasons set forth in our findings, we adhere to the rule as originally proposed with certain changes made thereto.

[fol. 12] *The Commission finds:*

(1) The natural gas industry and natural gas service are aided and developed by the use of long-term contracts for the sale of natural gas by producers to pipeline companies or to others, and it is desirable and appropriate in the public interest that long-term contracts be utilized as a basis for considerations of supply and service expansions by nautral gas companies.

(2) Long-term gas supply contracts containing provisions for rate changes dependent or based in part on "indefinite escalation clauses", as herein defined have contributed to instability and uncertainty concerning prices of gas and service expansion by natural gas companies. As found by us in the proceeding of *The Pure Oil Company*, Docket No. G-17930, Opinion No. 341 issued concurrently herewith, these indefinite escalation provisions, are contrary to the public interest. Such escalation provisions, therefore, are undesirable, unnecessary, and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies.

(3) It is necessary and appropriate in the public interest and in the proper administration of the Natural Gas Act that § 154.91 (a) of our General Rules and Regulations (18 CFR 154.91 (a)) be amended to include definitions of "definite escalation clause" and "indefinite escalation clause" to define clearly the amendment necessitated by our findings in subparagraph (2) hereof.

The Commission, acting pursuant to authority granted by the Natural Gas Act, particularly Sections 4, 7, and 16 thereof (15 U.S.C. 717c, 717f, and 717o), *orders:*

(A) Part 154, entitled Rate Schedules and Tariffs and Subchapter E—Regulations Under Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations, is amended as follows:

(1) In § 154.91 (a), change the caption "Definition" to read "Definitions (1)" and adding subparagraphs (2) and (3) to read:

"(2) 'Definite escalation clause' means any provision in an independent producer's contract for the sale of natural gas in interstate commerce for resale or the transportation of natural gas in interstate commerce which sets
[fol. 13] forth the price to be paid for natural gas delivered thereunder in terms of a specific price per unit, including, in addition to the initial price, any increases therein by specific amounts at definite future dates, or any provision which changes the specific price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller.

"(3) 'Indefinite escalation clause' means any provision, other than a definite escalation clause as defined in subparagraph (2) hereof, under which the price in a contract for the sale or transportation of natural gas by an independent producer subject to the jurisdiction of the Commission may be determined or changed."

(2) Adding a proviso at the end of § 154.93, *Rate schedule defined*, to read as follows:

"*Provided*, That any provision for a change of price of the seller by reason of indefinite escalation clauses, as defined in § 154.91 (a) (3), contained in a contract for the sale or transportation of natural gas subject to the jurisdiction of the Commission tendered for filing on and after April 3, 1961, shall be inoperative and of no effect at law."

(B) These amendments shall become effective April 3, 1961. Any interested person may submit to the Commission on or before March 20, 1961, views or comments in writing concerning these amendments.

(C) The Secretary of the Commission shall cause publication of this order to be made in the Federal Register.

By the Commission. Commissioner Kline, concurring in part and dissenting in part, filed a separate statement.

/s/ J. H. Gutride
JOSEPH H. GUTRIDE,
Secretary.

[fol. 14] Docket No. R-153

Nonacceptability of Contracts Between Producers and Interstate Natural-gas Companies Containing Certain Types of Automatic Escalation and Favored Nation Clauses

(Issued March 3, 1961)

KLINE, Commissioner, *concurring* in part and dissenting in part

I concur completely in the rule insofar as it renders void and inoperative favored nation, spiral escalation and price redetermination clauses in future contracts. I feel such clauses are definitely contrary to the public interest when appearing in gas contracts subject to our regulation.

I am opposed to the rule insofar as it renders void and inoperative provisions in producer contracts permitting price changes arrived at through negotiation or arbitration after a period of five years from the date of the contract. The broad definition of the term "indefinite escalation clause" contained in the rule would eliminate these as well as other unspecified contractual provisions.

It is the practice in the industry for producers to enter into long term contracts for the sale of gas. Such contracts usually run for twenty years or the life of the field which may be fifty or more years. The Commission encourages such long term contracts and this order itself

contains a finding that they are in the public interest. It is impossible for anyone to predict with accuracy the economic conditions so far in the future, what the costs of a producer will be at that time, or what will constitute a just and reasonable price for gas. Yet under the law a natural gas company is bound by its contract and may not unilaterally file for increased rates. *United Gas Pipe Line Co.*, vs. *Memphis 358 U.S. 103, United Gas Pipe Line Co.* vs. *Mobile, 350 U.S. 322.* Under such circumstances a producer should have a contractual right to re-negotiate his contract price at some time in the future in order to protect himself against inflation or other unforeseen contingencies. He should not be compelled to agree at the beginning of his contract to a fixed price for the gas twenty or fifty years in the future, when conditions may be wholly different.

[fol. 15] Many producers have already substituted such negotiation and arbitration clauses in their contracts in lieu of the favored nation and spiral escalation clauses. We have never had a hearing on the issue of whether such provisions are contrary to the public interest, the majority has failed to give any reason for outlawing them, and I can see no reason why we should not permit them.

A contract providing for re-negotiation of the price at some future date, and for arbitration in event the parties fail to agree, merely gives the producer the right to file for such price. The Commission will, of course, disallow it in event it is not a just and reasonable price. Since the gas is already committed to the pipeline, the producer will not have any distinct bargaining advantage. If anything, he will be at a disadvantage, and I see no reason to fear that excessive prices will result, even during the temporary suspension period, as a result of a negotiation and arbitration clause.

I appreciate the difficulty we have in stabilizing gas prices and I would have no objection to a rule finding that it is in the public interest to eliminate even the right to negotiate for a period during which we can reasonably expect economic conditions not to undergo too radical a change, such as a five year period.

In the Memphis case, *supra*, the Supreme Court sustained the contention of this Commission that a natural

gas company should have the contractual right to file for an increase even though the amount of the increase is not specifically stated in the contract. We cannot arbitrarily abolish that right but can do so only if the contractual provision supplying the right is against the public interest.

Finally, the adoption of such a broad rule seems to me to be extremely short sighted. Once a rule such as this is adopted, the average business man, as a matter of self preservation, will seek to avoid its effects. Here the producer will undoubtedly seek to protect himself by increasing the initial price or providing for steeper escalations or through some other means. We impliedly put our blessing on definite escalation clauses regardless of the amount. I consider a contract provision calling for a five cent escalation every five years far worse than a contract provision calling for a one cent escalation with the additional provision for negotiations. Yet the adoption of such a rule as this cannot help but lead to some such results.

[fol. 16] In summary, I am opposed to the rule as written because we have never published notice of any intention to adopt such a rule, no showing has been made that all outlawed clauses are against the public interest, and I believe a producer should not be required at his peril to attempt to set prices twenty years in the future, but should be afforded some reasonable means of negotiating a price at a time when he knows the conditions with which he will be faced.

/s/ Arthur Kline,
ARTHUR KLINE,
Commissioner

[fol. 17] UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and Paul A. Sweeney.

Docket No. R-153

Nonacceptability of Contracts Between Producers and Interstate Natural-gas Companies Containing Certain Types of Automatic Escalation and Favored Nation Clauses

(18 CFR 154.93)

ORDER No. 232A

ORDER MODIFYING ORDER AMENDING THE COMMISSION'S GENERAL RULES AND REGULATIONS

(Issued March 31, 1961)

On March 3, 1961, the Commission issued its Order No. 232 in this proceeding amending Sections 154.91 (a) and 154.93 of the Regulations under the Natural Gas Act (18 CFR 154.91 (a) and 154.93). The order provided that indefinite escalation clauses, contained in producer contracts filed on and after April 3, 1961, for the jurisdictional sale or transportation of gas, shall be inoperative and of no effect at law. Since March 3, interested persons have submitted views and comments concerning the amendments to our regulations. Upon consideration of such comments and upon our own further consideration, we find it necessary and appropriate to modify the amendments promulgated by Order No. 232.

We reaffirm our earlier findings that the use of long-term contracts for the sale of natural gas by producers to pipelines or to others is desirable and appropriate in the public interest but that indefinite escalation provisions are, in general, contrary to the public interest. However, it also appears that elimination of all indefinite escala-

tion provisions would be too restrictive to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts. Therefore, to permit pricing flexibility and to provide an incentive for long-term contracts, we should permit future [fol. 18] contracts to contain limited price-redetermination provisions, invocable not more than once in every five-year contract period and based upon rates subject to this Commission's jurisdiction (and therefore, controlled).

Also upon reconsideration, it appears that the amendments by their terms apply to any contract filed with the Commission on or after April 3, 1961, even if the contract was executed prior to April 3. The amendments should be changed to apply only to contracts executed on or after April 3, 1961.

We hereby *modify* our Order No. 232, issued March 3, 1961, in this proceeding, in the following manner *and order;*

(A) Paragraphs (2) and (3) of the Commission's findings are changed to read as follows:

(2) Gas supply contracts containing provisions for rate changes dependent or based in whole or part on indefinite escalation clauses such as favored-nation, unlimited redetermination or renegotiation, spiral escalation, inflationary adjustment, price indices and revenue-sharing clauses have contributed to instability and uncertainty concerning prices of gas and service expansion by natural gas companies. As found by us in the proceeding of *The Pure Oil Company*, Docket No. G-17930, Opinion No. 341, these indefinite escalation provisions are in general contrary to the public interest. Such escalation provisions, therefore, are generally undesirable, unnecessary and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies. However, limited price-redetermination provisions appear appropriate to meet the difficulty of pricing for long and unpredictable periods and to encourage the negotiation of long term con-

tracts. Limited price-redetermination provisions, as hereinafter ordered, appear to be in the public interest and should be permitted in producer contracts for the sale or transportation of natural gas subject to our jurisdiction.

(3) It is necessary and appropriate in the public interest and in the proper administration of the Natural Gas Act that § 154.93 of the Regulations under the Natural Gas Act (18 CFR 154.93) be amended to specify the change of price provisions that may be contained in future producer rate schedules submitted for filing with this Commission.

[fol. 19] (B) Paragraph (A) of the Commission's Order No. 232 is changed to read as follows:

(A) Part 154, entitled Rate Schedules and Tariffs, Subchapter E — Regulations under the Natural Gas Act, Chapter I of title 18, Code of Federal Regulations, is amended by adding a proviso at the end of § 154.93, *Rate schedule defined*, to read as follows: "*Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(2) provisions that change a price to a specific amount at a definite date; and

(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or

producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question.

(C) This amendment shall become effective April 3, 1961.

(D) The Secretary of the Commission shall cause publication of this order to be made in the Federal Register.

By the Commission. Commissioner Kline would further modify the order to permit renegotiation clauses in conconformity with the views expressed in his statement accompanying Order No. 232 issued March 3, 1961.

/s/ J. H. Gutride
JOSEPH H. GUTRIDE,
Secretary

[fol. 20]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioner:

Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., and Charles R. Ross.

Docket No. R-208

Rejection of Sales Contracts Containing Indefinite Escalation Clauses and of Applications Relying upon Such Contracts for Gas Supply

ORDER No. 242

AMENDING REGULATIONS UNDER THE NATURAL GAS ACT

(18 CFR 154.93, 157.14, 157.25)
(Issued February 8, 1962)

In this proceeding the Commission has under consideration the amendment of §§ 154.93, 157.14 (a) (10) Exhibit H(v), and 157.25, Subchapter E, Regulations Under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations.

By Order No. 232A, issued March 31, 1961 (26 F.R. 2850, 25 FPC 609), the Commission amended section 154.93 of its Regulations so as to provide that indefinite price escalation clauses in sales contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, would be inoperative and of no effect at law. The amendments herein adopted provide for (1) the rejection of contracts containing such indefinite escalation clauses (2) the rejection of applications by producers for certificate of public convenience and necessity relying for a gas supply upon contracts containing such indefinite escalation provisions, and (3) the Commission's refusal to consider such contracts submitted in support of certificate applications by pipeline companies.

Public notice of proposed rulemaking was given by publication in the Federal Register on October 10, 1961 (26 F.R. 9732), and by mailing copies thereof to interested persons, including natural gas companies, and to State and Federal agencies. In response to such notice, numerous comments were submitted. These comments have been carefully considered but, for the reasons set forth below, we adhere to the substance of the amendments as originally proposed.

[fol. 21] A number of parties contend that the promulgation of these regulations would be unlawful and beyond the powers granted to the Commission by the Natural Gas Act. We conclude, however, that sections 4, 5, and 7 of the Natural Gas Act contemplate that the Commission will refuse to approve contractual provisions found adverse to the public interest. Section 16 of the Act, of course, authorizes the Commission to issue rules and regulations of general applicability found necessary or appropriate to carry out the provisions of the Act.

Protection of the public interest is the touchstone of our regulatory powers under the Natural Gas Act. The Commission's obligation under the Act to the natural gas companies, as one segment of the public whose interest is to be protected, does not compel it to acquiesce in the use of contracts which carry provisions incompatible with a scheme of effective rate regulation. To be sure, the proposed rule will have impact upon contractual practices which have been fairly wide-spread. But the real issue is not one of "freedom of contract"; the question is whether the rule is rationally related to a condition which requires correction if regulatory objectives embraced by the statute are to be achieved. See *American Trucking Associations* v. *United States*, 344 U.S. 298. In our view, the rule we adopt fully meets this test.

We held in the *Pure Oil* case[1] that indefinite escalation clauses are contrary to the public interest and restated this conclusion in Order No. 232A. Increases in producer prices, triggered by indefinite escalation clauses, have resulted in a flood of almost simultaneous filings.

[1] *The Pure Oil Company*, 25 FPC 383.

These filings bear no apparent relationship to the economic requirements of the producers who file them. The Natural Gas Act contemplates that prices, to be just and reasonable, be related to economic needs. The elimination of indefinite escalation provisions does not, of course, cut off other avenues by which a producer may make provision for filing for increased rates.

Filings under indefinite escalation clauses have created a significant portion of the administrative burdens under which this Commission is laboring today. The Natural Gas Act contemplates that rate increases shall be sought when there is economic justification, but not that there shall be a chain reaction in a wide area whenever one [fol. 22] producer in the area negotiates a contract at a new price level. The Act requires the Commission to give precedence to the hearing and decision of rate increases, but the complexity of indefinite price clauses requires it to spend an undue amount of time in their interpretation and application at the expense of making a prompt determination of the rate issues involved. Accordingly, in protecting the public against waves of increases which have no defensible basis, we also serve the need — which we beilieve we should take into account — of making the tasks of regulation more manageable.

It has been brought to our attention that section 154.93 of the Regulations, as amended by Order No. 232A, refers to the date of execution of a contract, rather than the filing date (to which we referred in the notice of this proceeding). It is suggested that this point should be clarified. The Commission agrees and has made appropriate changes. In order to conform the language of the amendments to our existing regulations, we have also changed the phrase "price-escalation provisions" to "price-changing provisions".

The Commission, acting pursuant to authority granted by the Natural Gas Act, particularly sections 4, 5, 7 and 16 thereof (15 U.S.C. 717c, 717d, 717f, and 717o), *orders* that Parts 154 and 157, Subchapter E, Chapter I, of Title 18 of the Code of Federal Regulations be amended as follows:

(A) § 154.93 *Rate Schedule Defined*, is amended by adding a provision at the end thereof to read:

> *Provided further*, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

(B) § 157.14 (a) (10) *Exhibit H—Total Gas Supply Data* (v), is amended by adding a proviso at the end thereof to read:

> *Provided, further, however*, That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains any price-changing provisions other than those defined as permissible in § 154.93 hereof.

(C) § 157.25 *Necessary exhibits, Exhibit B, Contracts*, is amended by deleting all the language after the first [fol. 23] sentence thereof, ending with the words "Natural Gas Act", and inserting in lieu thereof the following:

> On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 hereof.

(D) These amendments shall become effective on April 2, 1962.

(E) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

By the Commission. Commissioner O'Connor not participating.

/s/ J. H. Gutride
JOSEPH H. GUTRIDE,
Secretary.

[fol. 24]

DOMESTIC PRODUCING DEPARTMENT
TULSA DIVISION

AUG. 27, 1962

APPLICATION FOR CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY

TEXACO INC.
TULSA DIVISION
CAMRICK SOUTHEAST FIELD
BEAVER COUNTY, OKLAHOMA
CONTRACT 0-54

Mr. J. H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.

Dear Sir:

We enclose for filing in accordance with Sections 157.23 et seq. of the Commission's Regulations the original and seven (7) copies of an application for certificate of public convenience and necessity.

The designated gas sales contract with Natural Gas Pipeline Company of America is being contemporaneously filed as a rate schedule.

We respectfully call your attention to the request in the application for temporary authorization for the reasons set forth.

Yours very truly,

TEXACO INC.
DOMESTIC PRODUCING
DEPARTMENT

By Signed: O. F. Sebesta
O. F. SEBESTA
Division Manager
Tulsa Division

Enclosure

[fol. 25]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. .....

In the Matter of)
TEXACO INC.)

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Texaco Inc., a corporation organized under the laws of the State of Delaware, having a principal place of business in the City of Houston, Texas, and being authorized to do business in all states files this application for a certificate of public convenience and necessity pursuant to the Natural Gas Act and applicable Commission Regulations. The proposed sale is summarized in Exhibit "C".

Communications in regard hereto should be directed to:

Mr. W. V. Vietti, Manager Gas Division
P. O. Box 2332
Houston, Texas

and it is requested that copies be sent to:

Mr. P. F. Schlicher, Attorney
Texaco Inc.
135 East 42nd Street
New York 17, New York

and to:

Mr. O. F. Sebesta, Division Manager,
Texaco Inc.
P. O. Box 2420
Tulsa 2, Oklahoma

[fol. 26] Applicant is informed by its purchaser that gas sold under the authority requested, ultimately will be transported in interstate commerce. The gas to be sold is produced in the Camrick Southeast Field, Beaver County,

Oklahoma, as indicated on Exhibit "A" and is to be delivered to the purchaser at the outlet of the well, or separator at or near the well.

Applicant hereby advises the Commission that an emergency exists because Applicant's properties are being subjected to gas migration by producing wells on leases adjacent to applicant's properties in the Camrick Southeast Field, Beaver County, Oklahoma, and it accordingly invokes Section 157.28 of Subchapter E. Regulations under the Natural Gas Act, to initiate and continue the sale of gas in interstate commerce pending final action of the Commission on this application for a certificate of public convenience and necessity and without prejudice to conditions as may be attached to the issuance of the certificate.

WHEREAS, subject to the foregoing, Applicant respectfully requests that it be issued a Certificate of Public Convenience and Necessity authorizing it to make the foregoing sale under the contract and Applicant hereby requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission and requests that this application be heard under the shortened procedure as provided by Section 1.32, Subchapter A, General Rules of the Commission.

Respectfully submitted,

TEXACO INC.

By Signed: O. F. Sebesta
O. F. SEBESTA
Division Manager
Tulsa Division

[fol. 27]

[Duly sworn to by O. F. Sebesta jurat omitted in printing (all in italics)]

[fol. 28] EXHIBIT "B"

Pursuant to Section 157.24 (b) and Section 157.25, Subchapter E, Regulations under the Natural Gas Act, Applicant incorporates herein by reference that certain Gas Sales Contract, dated May 1, 1962, between Texaco Inc., Seller, and Natural Gas Pipeline Company of America, Buyer, covering the sale of gas from the Camrick Southeast Field, Beaver County, Oklahoma. Said Gas Sales Contract has been filed with the Commission contemporaneously herewith as Applicant's Rate Schedule.

[fol. 29] EXHIBIT "C"

CONTRACT SUMMARY

1. Name of Seller: Texaco Inc.
2. Name of Purchaser: Natural Gas Pipeline Company of America
3. Location of Sale: Camrick Southeast Field Beaver County, Oklahoma
4. Date of Contract: May 1, 1962
5. Initial Price per MCF: 17.0¢
6. Measurement Pressure Base (psia): 14.65#
7. Types of Escalation Provisions: Periodic
8. Hydrocarbon Liquids Included: Yes
9. Other Price Adjustments: Periodic Redetermination
   Tax Reimbursement: 75% of all new taxes
10. Estimated Initial Volumes (MCF per day): 197
11. Delivery Pressure (psig): Maximum: 90% of Shut-in Pressure
    Minimum: 200#
12. Delivery Point: Outlet of well or separator at or near the well.

[fol. 30]

DOMESTIC PRODUCING DEPARTMENT
TULSA DIVISION

Aug. 27, 1962

RATE SCHEDULE
TEXACO INC., TULSA DIVISION
CAMERICK SOUTHEAST FIELD
BEAVER COUNTY, OKLAHOMA
CONTRACT 0-54

Mr. J. H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.

Dear Sir:

We enclose for filing in accordance with Sections 154.92 (b) and 154.93 of the Commission's Regulations, the following:

(1) Three (3) copies of a Gas Sales Contract dated May 1, 1962, between Texaco Inc., Seller, and Natural Gas Pipeline Company of America, Buyer, covering certain properties in the Camrick Southeast Field, Beaver County, Oklahoma. A copy of this letter is attached to each contract.

(2) An estimate of the sales and billing for the first month of service is shown on Table I.

Natural Gas Pipeline Company of America is being furnished a complete copy of this material.

An application for a certificate of public convenience and necessity (including a request for the issuance of a temporary certificate) is being filed contemporaneously herewith.

Communications with respect hereto should be directed to Mr. W. V. Vietti, P. O. Box 2332, Houston 1, Texas; Paul F. Schlicher, Texaco Inc., 135 East 42nd Street,

New York 17, New York; and the undersigned at P. O. Box 2420, Tulsa 2, Oklahoma.

Yours very truly,

TEXACO INC.
DOMESTIC PRODUCING DEPARTMENT

By Signed: O. F. Sebesta
O. F. SEBESTA
Division Manager
Tulsa Division

Enclosure

[fol. 31]

TABLE I

SELLER: TEXACO INC.
PURCHASER: NATURAL GAS PIPELINE COMPANY OF AMERICA
FIELD: CAMRICK SOUTHEAST
COUNTY AND STATE: BEAVER COUNTY, OKLAHOMA
CONTRACT DATE: MAY 1, 1962

Estimated Volume during Month of Initial Delivery
5,910 MCF @ 17.0¢ per MCF $1,004.70

Volume calculated at pressure base of 14.65 psia, determined and measured as provided in the contract and in accordance with the Oklahoma Standard Gas Measurement Law.
The volumes indicated are gross volumes attributable to the working interest ownership of Texaco Inc. and revenues shown include interests of royalty owners and do not represent the net interest owned by Seller.
It is anticipated that initial service will commence as soon as possible after issuance of the temporary certificate requested in Seller's application filed contemporaneously herewith.

[*Duly sworn to by O. F. Sebesta jurat omitted in printing (all in italics)*]

[fol. 32]

GAS PURCHASE AGREEMENT

CAMRICK SOUTHEAST GAS POOL
(Section 1-1N-20ECM)

BETWEEN
NATURAL GAS PIPELINE COMPANY OF AMERICA
AND
TEXACA INC.

DATED: MAY 1, 1952

[fol. 33] * * *

[fol. 34]

GAS PURCHASE AGREEMENT

This Agreement, made and entered into as of the 1st day of May 1962, by and between Natural Gas Pipeline Company of America, a Delaware corporation, hereinafter referred to as "Buyer" and TEXACO INC., a Delaware corporation, hereinafter referred to as "Seller",

WITNESSETH:

WHEREAS, Seller represents that it is the owner of certain oil and gas leases covering land in Beaver, County, Oklahoma, which oil and gas leases are more particularly described as Exhibit "A" attached hereto; and

WHEREAS, Seller represents that said leases, insofar as the land described in Exhibit "A" is concerned, have been unitized with other oil and gas leases for the production of oil and gas, which unit covers all of Section 1, Township 1-North, Range 20 ECM, so that the owner of each leasehold interest will participate in the total quantity of natural gas which may be produced from the unitized area in the proportion which the number of acres covered by said leasehold interest bears to the total number of acres in said Section 1 regardless of the location of the well or wells from which such gas may be produced,

the leasehold and percentage ownership in said unitized area of each of the participants being set out in Exhibit "A"; and

WHEREAS, Seller represents that a well has been completed on said unitized area, known as Morgan No. 1 which well is productive of gas only or gas with only small quantities of liquefiable hydrocarbons from the Chester Formation; and

WHEREAS, Buyer represents that it owns and operates a natural gas transportation system extending from the Panhandle Gas Field of Texas to termini in the State of Illinois and a gathering system in Texas and Beaver Counties, Oklahoma, connected therewith; and

WHEREAS, Buyer desires to purchase, and Seller desires to sell to Buyer, Seller's interest in gas now available and which may become available from said unitized area under and in accordance with the terms and pro-
[fol. 35] visions hereinafter set forth, to supply a portion of Buyer's requirements for its gas transportation system:

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained, and of the sum of ten dollars ($10.00) in hand paid by Buyer to Seller, the parties hereto, Seller and Buyer, hereby agree as follows:

ARTICLE I

GAS AFFECTED

(1) Except for such quantities of gas as are hereinafter reserved by Seller, it is understood and agreed that that the gas available for sale and delivery hereunder (hereinafter called the "gas reserves") shall be gas produced from formations situated between the surface of the ground and the base of the Chester Formation of Mississippian Age attributable to Seller's interest in the unitized area described in Exhibit "A" attached hereto. No sale, transfer or assignment of all or any part of Seller's producing property or properties, or gas reserves

located on lands covered by this agreement shall be made by Seller unless such sale, transfer or assignment specifically provides that the purchaser, assignee or transferee thereof shall be bound by all the terms and provisions of this agreement, it being the purpose and intent of this paragraph that Seller shall not sell, assign or transfer, in whole or in part, any of its producing property or properties, or gas reserves located on said lands as aforesaid, so as to deprive Buyer of the right to purchase under the terms and provisions hereof gas produced therefrom.

(2) There is reserved unto Seller from this agreement sufficient gas:

(a) for its own use (and for the use of its subsidiary or affiliated companies) in devoloping and operating (exclusive of gas lift, repressuring, pressure maintenance or cycling operations) its own oil and gas properties described in Exhibit "A", for the use of such party or parties as may be developing or operating such oil or gas property or properties of Seller, and for sale to a drilling contractor therefor, but in each case only to the extent such gas is required in connection with developing and efficiently [fol. 36] operating and producing Seller's said oil and gas properties in accordance with sound engineering and conservation practices.

(b) for sale to a drilling contractor engaged in drilling wells located on Seller's leases in the immediate vicinity of the leases described in Exhibit "A" hereto.

(c) for repressuring, pressure maintenance and cycling operations of the leases described in Exhibit "A", only if such operations are required by valid order or orders of any regulatory authority having jurisdiction.

(d) for the operation of any compressor station or stations of Seller operated in connection with the gas delivered hereunder.

(e) for the operation of Seller's (and its subsidiary or affiliated companies) oil pipeline or lines, compressors, water stations and camps, where the

gas is consumed in the area covered by the properties described in Exhibit "A".

(f) for all other miscellaneous uses, if any, incident to Seller's business of developing, operating for and producing oil, gas and other minerals from the leases described in Exhibit "A" in accordance with sound engineering and conservation practices.

(g) for use by Lessors in accordance with lease agreements referred to in Exhibit "A".

(3) Seller shall not be required by reason of this agreement to drill or rework any well or wells except when in Seller's sole judgment, exercised reasonably and in good faith, such operations are economically feasible. Seller shall not be obligated hereunder to operate any well or wells affected by this contract so as to produce a quantity of gas in excess of the allowable production thereof as fixed by the rules or orders of any regulatory body, State or Federal, having jurisdiction, or in excess of the quantity which said well is capable of producing under sound engineering and gas production practices. Seller shall not be obligated to sell gas-cap gas (defined as gas found in a statum also containing oil, at a point higher on the structure than oil, the production of which is subject to regulation in relation to the production of oil), provided, however, if any gas well or wells shall be connected to Buyer's gathering systems by either Buyer or Seller under the provisions of paragraphs (1) or (2) of Article III prior to a finding by the regulatory [fol. 37] authority that such well or wells are productive of gas-cap gas, said wells shall remain so connected and the gas produced therefrom shall not be considered as gas-cap gas.

(4) Buyer shall give Seller a least thirty (30) days' written notice of the date upon which it may reasonably expect to commence taking deliveries hereunder.

ARTICLE II

SALE OF GAS AND QUANTITY

1() Subject to the other provisions hereof, Seller agrees to sell and deliver, and Buyer agrees to take and

pay for, or failing to take, nevertheless to pay for, a daily quantity of gas, averaged over each calendar year or fraction thereof, from each gas well equal to the least of the following volumes, (hereinafter referred to as the "daily contract quantity");

(a) The daily volume such well is capable of producing at a well head working pressure (psia) equivalent to ninety per cent (90%) of its shut-in well head pressure (psia). "Shut-in well head pressure" as used herein shall mean that pressure resulting from (1) the use of a dead weight tester after a shut-in period of not less than sixty-six (66) hours nor more than seventy-two (72) hours, or (2) if mutually agreeable to the parties hereto, the application of a method or methods for such determination as prescribed by any duly constituted regulatory body having jurisdiction;

(b) Twenty per cent (20%) of such well's daily absolute open flow potential as same may be determined annually by test methods approved by any regulatory body having jurisdiction;

(c) One million (1,000,000) cubic feet per day for each ten billion (10,000,000,000) cubic feet of gas which is estimated to be commercially recoverable from the gas reserves originally in place under the acreage allocated to such well.

(2) It is recognized that from time to time the allocation of production as between wells on the acreage covered hereunder (in the event that more than one well should hereafter be drilled on said acreage) may become subject to rules and regulations of duly constituted [fol. 38] regulatory bodies having jurisdiction and that as a result Buyer may not be permitted to distribute its withdraws as between wells on the basis of the daily contract quantity as above provided. Buyer agrees in such event and with respect to any such period to nominate as its market requirements from all wells connected to its pipeline system in the area covered by such rules and regulations a volume of gas equal to at least one million (1,000,000) cubic feet of gas per day for each ten billion

(10,000,000,000) cubic feet of gas which is estimated to be commercially recoverable from the gas reserves originally in place under all acreage allocated to productive gas wells connected to Buyer's pipeline in such area and Buyer further agrees in such event to take and pay for, or failing to take, nevertheless to pay for, a daily average quantity of gas hereunder which in the aggregate is equal to at least the sum of the then applicable daily contract quantities (with respect to each gas well) as set forth in paragraph (1) of this Article II, which quantity shall be allocated between Seller's wells to the extent permitted by regulation. It is understood, however, that Buyer shall not be required to take and pay for or pay for, if not taken, any gas hereunder which is in excess of that which Seller is permitted to produce under any such rules and regulations. Should the provisions of this paragraph (2) become operative, then the aforesaid daily average quantity (i.e., which in the aggregate is equal to at least the sum of the then applicable daily contract quantities with respect to each gas well) shall be construed as the daily contract quantity for purposes of this contract. It is agreed that the provisions of this paragraph (2) shall be applied separately with respect to each field or area covered hereunder to the extent that such fields or areas are goverened by separate and different rules and regulations insofar as allocation of gas well gas withdrawals are concerned.

(3) Seller will furnish to Buyer within sixty (60) days from the date hereof all basic data which it has available and which is required for Buyer to estimate the commercially recoverable gas reserves originally in place under the acreage allocated to the well completed on said date. Within fifteen (15) days of the completion of each well completed subsequent to said date, Seller will furnish to Buyer all basic data which it has available and which is required for Buyer to estimate the commercially recoverable gas reserves originally in place [fol. 39] under acreage allocated to such additional well or wells. Periodic determinations shall be made of the reserves allocable to all wells covered by this agreement at the request of either party but not oftener than once

every two (2) years. It is understood that any such determination of reserces shall be made by Buyer using basic data supplied to it by Seller and that the sole purpose of any such reserve estimate shall be to determine Buyer's minimum obligation to take gas hereunder pursuant to the provisions of sub-paragraph (c) of paragraph (1) of this Article II and/or paragraph (2) of this Article II. No reserve determination shall increase or decrease Seller's or Buyer's obligation except from and after the date that Seller accepts and approves Buyer's estimate. It Seller disagrees with Buyer's determination of reserves, the matter shall be submitted to the firm of DeGolyer and MacNaughton, Dallas, Texas or its successor unless the parties agree upon some other geological firm. The estimate of the commercially recoverable reserves made by said geological firm shall be final and binding upon both parties. If it becomes necessary to employ a geological firm to make an estimate of such reserves, the cost of such estimate shall be borne equally by the parties.

(4) Buyer may, at its election, at any time and from time to time, take such additional quantities of gas as Seller's gas wells are capable of producing and delivering consistent with the rules and regulations of any regulatory body having jurisdiction; provided, however, Seller shall not be required to produce any gas well in excess of the rate of production of such well as established or determined under sound engineering and gas production practices nor to deliver in any one calendar year an average daily quantity of more than one hundred thirty-five per cent (135%) of the daily contract quantity provided for in paragraphs (1) and/or (2) of this Article II.

(5) In the event (subject to paragraph (10) of this Article II) Buyer shall fail to take during any calendar year, or applicable portion thereof, the minimum daily average quantity from each gas well as herein provided, and such failure is not due to the physical or legal non-availability of gas, causes within the control of Seller or force majeure intervention, then within thirty (30) days after the end of such calendar year, Buyer shall pay Seller the difference between the daily contract quantity [fol. 40] required to be taken and the amount actually taken by Buyer during such calendar year. Payment shall

be made at the weighted average price paid by Buyer for gas taken hereunder during such calendar year. In the calendar year subsequent to that in which Buyer failed to take the gas so paid for, all gas taken by Buyer which is in excess of the daily contract quantity for such well for such year shall be known as "make up gas" and shall be without charge except for the difference in price, if any, between the price previously paid for the "make up gas" and the current price in effect at the time of taking, for gas delivered under the terms of this contract, and until such excess is equal to the amount of gas previously paid for but not taken or until the said calendar year provided for the taking of "make up gas" has passed.

(6) Should one or more of the then existing gas wells on the acreage covered hereunder be incapable of producing the maximum quantities Buyer is entitled to take under the provisions of paragraph (4) of this Article II, then and in such event upon request of Buyer the daily contract quantity with respect to any such well shall be reduced in proportion to such well's inability to produce such maximum quantity for so long as such well is incapable of producing such maximum quantity.

(7) Each party recognizes that wells of Seller producing gas covered by this agreement may from time to time produce such gas from the same reservoir as that from which gas is produced by wells of other producers from which Buyer is taking or may hereafter take gas, and Buyer therefore agrees to take gas ratably from such wells of Seller in proportion to Buyer's taking of gas from wells of other producers in the same reservoir.

(8) Subject to the further provisions of this paragraph (8) Seller shall have the right to sell and deliver to parties other than Buyer (or otherwise dispose of) gas in excess of the maximum quantities as set forth in Paragraph (10) of this Article II (herein referred to as "surplus gas"). The quantity of such surplus gas shall be the difference between the remaining reserves producible from the leases covered by this contract and one and one-half (1½) times the undelivered quantities as set forth in said paragraph (10) of this Article II. Seller shall have the right to make

[fol. 41] any disposition of such surplus gas, if any, it desires, provided that the production and sale of such surplus gas shall not interfere with the taking of gas by Buyer hereunder.

Subject to the reservations set out in Article I, Seller agrees not to intentionally deplete the gas reserves so as to reduce such gas reserves below one and one-half (1½) times the undelivered maximum quantities as specified herein; provided, however, if Seller unintentionally reduces such reserves below one and one-half (1½) times said maximum quantities at any time, Seller shall not be liable to Buyer for any breach hereunder; and provided further Seller shall have the right from time to time (and only so long as such condition prevails) to sell and dispose of any gas which in its judgment, exercised in good faith, is necessary to prevent undue migration or drainage from any lease described in Exhibit "A", after first offering to Buyer the right (to be exercised within thirty (30) days after written notice of the quantities involved and an explanation of existence and amount of drainage) to purchase such gas hereunder, in addition to the quantities herein provided.

(9) With respect to any gas well completed as of the date hereof, Seller's obligation to sell and deliver and Buyer's obligation to take and pay for, or failing to take nevertheless to pay for, the daily contract quantity shall commence ninety (90) days from the date that all of the owners of oil and gas leasehold interests included within the unitized area described in Exhibit "A" shall have furnished Buyer written notice that they have accepted their Certificates of Public Convenience and Necessity provided for in Article XIX hereof. With respect to wells completed subsequent to the date hereof, subject to sub-paragraphs (a) and (b) of paragraph (1) of Article III, Seller's obligation to sell and deliver and Buyer's obligation to take and pay for, the daily contract quantity shall commence sixty (60) days following the date that Buyer shall be furnished the basic data referred to in paragraph (3) of Article II.

(10) Notwithstanding anything to the contrary in this agreement, Buyer shall in no event be required to take, or

if tendered and not received, to pay for more than one million (1,000,000) cubic feet of gas per day averaged over any calendar year from gas well/s located on the Unit Area, described in Exhibit "A". The maximum volume [fol. 42] provided in this paragraph shall not include oil well gas or gas-cap gas which may be delivered hereunder.

(11) Notwithstanding anything to the contrary in this agreement, Seller shall in no event be required to deliver in any one calendar year an average daily quantity of more than one hundred thirty-five per cent (135%) of the maximum quantity required to be taken or paid for by Buyer in paragraph (10) of this Article II. The maximum volume provided in this paragraph shall not include oil well gas or gas-cap gas which may be delivered hereunder.

(12) To meet the exigencies of Buyer's operations, Buyer may vary its receipts of gas hereunder; provided Seller shall not be required to deliver more than one hundred thirty-five per cent (135%) of the daily contract quantity on any one day; provided further to assure Seller that the gas wells covered hereunder and connected to Buyer's gathering system will remain on a continuous and uninterrupted productive status, Buyer agrees, subject only to force majeure, to purchase each calendar month a daily average quantity of gas from each such well equal to at least sixty-five per cent (65%) of such well's daily contract quantity.

ARTICLE III

BUYER'S GATHERING SYSTEM

(1) Subject to the other provisions hereof, Buyer agrees to construct a gathering system to connect the gas wells (now or hereafter drilled by Seller) on leases described in Exhibit "A" to Buyer's interstate natural gas transportation system; provided Buyer shall not be required to extend such gathering system:

(a) except as there may be an open flow potential of any gas well equal to two million four hundred thousand (2,400,000) cubic feet of gas per mile of

gathering system to be installed for the particular well, or

(b) to any well having a shut-in well head pressure less than five hundred (500) psig.

[fol. 43] (2) Gas available from gas wells to which Buyer is not obligated to connect as aforesaid may be delivered by Seller (if Seller so elects), to Buyer at a mutually agreeable point near Buyer's gathering system at the operating pressure maintained therein from time to time at said point, it being understood that in all other respects this contract shall govern as to the sale and purchase of any such gas.

(3) It is understood that Buyer shall have no obligation to construct a gathering system to oil wells productive of oil well gas or gas wells productive of gas-cap gas now or hereafter drilled by Seller on the acreage covered hereunder and Buyer shall not be required to purchase gas produced from such wells; but such gas may be delivered hereunder upon supplemental agreement between Buyer and Seller. The term "oil-well gas" means gas found in an oil stratum and produced from such stratum with oil.

ARTICLE IV

POINT OF DELIVERY

(1) The point of delivery of gas to be delivered by Seller to Buyer hereunder shall be at the side gate (such gate of suitable size to be furnished by Seller) of the well head of each gas well to which Buyer is required to extend its gathering system and located on the acreage covered hereunder or unitized therewith, except that if Seller installs a separator for the removal of hydrocarbon liquids, the point of delivery shall be at the discharge side of such separator; and title to the gas shall pass from Seller to Buyer as so delivered. In the event gas is delivered under the terms of paragraph (2) of Article III hereof, the point of delivery for any such gas shall be at a mutually agreeable point near Buyer's gathering system.

(2) If Seller should elect to process the gas, as provided in Article VI hereof, Buyer shall gather same as the

property of Seller, redeliver same to the processing plant, and Seller shall deliver the residue gas to Buyer at the outlet of said processing plant, at which point title shall pass to Buyer.

[fol. 44]

ARTICLE V

DELIVERY PRESSURE

(1) Subject to the further provisions of this Article V, Buyer agrees that the pressure in its gathering system will be not more than ninety per cent (90%) of the shut-in wellhead pressure (as hereinbefore defined) at each point of delivery provided for in paragraph (1) of Article IV hereof, except the points of delivery for gas delivered under the terms of paragraph (2) of Article III hereof, but in no event shall Buyer be required to keep its pressures less than two hundred (200) pounds per square inch gauge.

(2) In the event that any of Seller's gas wells are temporarily incapable of production against such maximum pressure in Buyer's gathering lines, then Buyer's obligation with respect to the daily contract quantity as hereinbefore set forth in Article II shall be suspended insofar as that particular well is concerned for the period of time during which such well remains incapable of production against such maximum pressure.

(3) Seller shall have the right, but not the obligation to install and maintain at its expense compression equipment in order to meet requirements hereunder insofar as pressure is concerned. In the event that Seller does not desire to compress the gas for delivery hereunder when necessary, Seller shall have the right to withdraw from the operation of this agreement the wells and the acreage attributed thereto from which gas is produced at pressures insufficient to enter Buyer's pipeline, but only as to the then producing formations.

ARTICLE VI

EXTRACTION OF LIQUIDS

(1) Subject to the provision of this Article, Seller may cause the gas delivered hereunder to be processed for the

recovery of natural gasoline and other hydrocarbons, but only in the gasoline plant which has been constructed by or on behalf of The Texas Company now Texaco Inc. and others on Buyer's gathering system; provided that in such event Seller shall cause the Operator of said plant (herein [fol. 45] referred to as such) to process the gas so that: the residue gas remaining after processing will contain at least one thousand (1,000) British thermal units per foot; the dew point of the residue gas delivered to Buyer shall be no higher than that of the commingled gas delivered from the gathering system to the plant; the residue gas shall contain no additional extraneous or deleterious materials; the decrease in pressure of the gas between the inlet and outlet of the processing plant shall be no more than requisite for its efficient operation and in no case more than 15 pounds per square inch; the residue gas shall have a temperature not substantially higher than that of the unprocessed gas delivered to the plant.

(2) In the event of such processing, Seller shall further cause the Operator: to install measuring equipment and measure the volume of gas taken from Buyer's gathering lines and the volume returned, such measurement to be in accordance with the provisions of Article VIII (those applicable to Buyer applied to the Operator and those applicable to Seller applied to the Buyer); to return to Buyer at the point of delivery a volume of residue gas equal to the difference between the volume received by the plant and the volume consumed in the extraction process (including plant fuel); to furnish Buyer a monthly statement on or before the 20th of each month showing (i) the total volume of residue gas delivered after processing during the previous month and the volumes of such residue gas attributable to each point at which unprocessed gas entered Buyer's gathering system, and (ii) the total volume of gas consumed in the extraction process (including plant fuel) during the previous month, and volumes of such gas attributable to each point at which unprocessed gas entered Buyer's gathering system, conditioned that Buyer shall furnish the plant operator a monthly statement on or before the tenth (10th) day of each month showing the points at which unprocessed gas

entered its gathering system and the volumes received at each such point during the preceding month.

(3) In the event of such processing, Seller shall pay Buyer one cent (1¢) per thousand cubic feet for gathering that volume of gas consumed in the extraction process (including plant fuel); provided, however, should Buyer be required to install field compression equipment [fol. 46] in order to maintain pressures in its gathering system in accordance with the provisions of paragraph (1) of Article V, Seller shall thereafter pay Buyer an additional one-half cent (½¢) per thousand cubic feet for compressing said gas.

ARTICLE VII

QUALITY

(1) Seller agrees that the gas delivered from each well shall be gas as obtained in its natural state, and

(a) shall be commercially free from objectionable odors, dust or other solid or liquid matter which might interfere with its merchantability or cause injury to or interference with proper operations of the lines, regulators, meters or other appliances through which it flows;

(b) shall contain less than one-half (½) grain of hydrogen sulphide per hundred (100) cubic feet of gas volume as determined by the cadmium sulphate quantitative test as presently prescribed by the regulations of the Railroad Commission of Texas;

(c) shall not contain more then twenty (20) grains in total of sulphur compounds per hundred (100) cubic feet of gas volume.

(2) If the total heating value of the gas delivered by Seller hereunder shall at any time fall below one thousand (1,000) British thermal units per cubic foot at the point or points of delivery or fail to conform to any of the other specifications set forth in this Article, then Buyer agrees to notify Seller of such deficiency and Buyer thereupon may at its option and without obligation refuse to accept delivery of such inferior gas pending correction by Seller,

which correction shall not be obligatory unless such deficiency is due to gasoline or liquid hydrocarbon extraction by Seller, except that Seller shall discontinue delivery from any particular well causing the deficiency in quality.

(3) In the event the gas offered for delivery by Seller and accepted by Buyer shall have a total heating value at the points of delivery below one thousand (1,000) British thermal units per cubic foot; the price per one [fol. 47] thousand (1,000) cubic feet hereinafter provided for shall be decreased for any such gas so deficient in heating value by an amount equal to the product of the price times a fraction, the numerator of which is the deficiency in total heating value per cubic foot below one thousand (1,000) British thermal units, expressed in whole numbers to the next highest multiple of five (5) British thermal units, and the denominator of which is one thousand (1,000).

(4) In the event the gas offered for delivery by Seller shall at any time have a total heating value at the points of delivery below one thousand (1,000) British thermal units per cubic foot and such deficiency is caused by the fact that Seller is producing gas from wells which have a total heating value below one thousand (1,000) British thermal units per cubic foot Seller may, in order to raise the total heating value of the gas to or above one thousand (1,000) British thermal units per cubic foot, except as Buyer is willing to accept gas of less BTU content, withdraw from this agreement the wells and the gas leases, or portions of leases attributable to such wells, from which Seller is producing or receiving the gas having a total heating value below one thousand (1,000) British thermal units per cubic foot.

(5) Should gas available from any well covered hereunder fail to conform to the above quality specifications, the parties shall immediately after ascertaining that fact endeavor to negotiate a basis upon which to include such gas under the terms of this agreement; it being understood that (1) if Buyer elects to treat any such gas to make same meet said quality specifications, a mutually agreeable compensating adjustment shall be made with respect to the price to be paid to Seller for any such gas

so treated by Buyer, and (2) if Seller elects to treat any such gas to make same meet said quality specifications, the prices hereinafter set forth in Article X shall prevail insofar as any such gas is concerned. In the event that neither party elects to treat such gas to meet said quality specifications as provided hereunder, Seller shall have the right to withdraw from the operation of this agreement the wells and the acreage attributed thereto from which gas is produced which fails to conform to the above quality specifications, but only as to the then producing formations.

[fol. 48]

ARTICLE VIII

MEASUREMENT AND MEASUREMENT EQUIPMENT

(1) The unit of volume for the measurement of all gas delivered under this contract shall be one (1) cubic foot of gas at a base temperature of sixty degrees (60°) Fahrenheit and a total pressure base of fourteen point six five (14.65) pounds per square inch absolute, and the readings and registrations of the metering equipment herein provided for shall be computed in terms of such unit. Measurement and computations of the volume shall be in accordance with the Gas Measurement Committee Report Number 3 of the Natural Gas Department of the American Gas Association, dated April 1955, together with all amendments, appendices and additions to said report. Measurement equipment and the installation of same shall be in accordance with specifications set out in such report. For the purpose of computing measurements under the aforesaid Report Number 3, the following factors shall be determined and applied in the following manner:

(a) The atmospheric pressure is assumed to be thirteen point two (13.2) pounds per square inch absolute irrespective of the actual barometric pressure or in variations of the same from time to time.

(b) The Reynolds number factor, the expansion factor, and the manometer factor are assumed to be one (1) irrespective of the actual value of these factors.

(c) The specific gravity of the gas shall be determined every six (6) months by joint tests or as much oftener as is found necessary in practice or, at either party's option, as often as once each month. The method of test used shall be by Edward's Balance or by such other methods as shall be agreed upon by the parties. The regular tests, at the first of each (6) month period shall determine the specific gravity to be used in the computations for the measurement of gas deliveries during such period or until changed by special tests, the special tests to be applicable from the date made and through the following days to and including the last day of such period or until further special tests are made.

(d) The deviation from Boyle's Law at each of the points of delivery hereunder shall be determined once each year, or as agreed between the parties, and the [fol. 49] proper supercompressibility factor so determined shall be used in computing measurements hereunder.

(e) The temperature of the flowing gas shall be assumed to be sixty degrees (60°) Fahrenheit; provided, however, that either party hereto may at its option at any time, install recording thermometers to properly record the temperature of the gas flowing through the meters, and the temperatures so recorded shall be used in computing such measurements.

(2) Buyer shall install, maintain and operate, at is own expense at each of Seller's wells or separate delivery point near Buyer's gathering system, orifice meters of ample size and type for the accurate measurement of the gas received by it hereunder, and will cause said meters to be read at least once each week. The location of meters and the method of setting meters shall be such as to prevent pulsations of compressors from interfering with accurate measurements. Seller shall provide Buyer with an adequate site or sites for such meters and the right of ingress and egress to the extent permitted under the terms of Seller's oil and gas leases. The respective meters, meter readings and meter charts shall be accessible to inspection and examination by Seller at all reasonable times. The meters shall be calibrated at least once each month and

orifice plates and meter connections shall be inspected at least once each year and replaced or repaired if found faulty by and at the expense of Buyer but in the presence of Seller, if Seller so elects. Reading, calibration and adjustment of Buyer's meters and changing of charts shall be done by Buyer, but all data with respect thereto shall at all times be available to Seller. If upon any test the percentage of inaccuracy shall be two per cent (2%) or more, registrations thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration. Following any test, metering equipment found inaccurate shall be immediately restored by Buyer as closely as possible to a condition of accuracy. If for any reason any meter is out of service and/or out of repair so that the amount of gas delivered cannot be ascertained or computed from the readings thereof, the gas delivered through the period such meter is out of service and/or out of repair shall be estimated and agreed upon [fol. 50] by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation;

(b) By using the registration of Seller's check meter if installed and accurately registering;

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

(3) Seller may, at its option and expense, install and operate check meters to check Buyer's meters, but measurements of gas for the purpose of this contract shall be by Buyer's meters only, except in cases herein specifically provided to the contrary. Check meters shall be of orifice type and shall be subject to all reasonable times to inspection or examination by Buyer, but the reading, calibration and adjustment thereof and changing of charts shall be done only by Seller.

(4) To the extent that the provisions of this Article VIII are in conflict with any applicable state statutes providing for compulsory standard gas measurement, it is recognized and agreed that the latter shall prevail and govern with respect to gas covered hereunder.

(5) Buyer shall give notice to Seller of the time of all tests of gas delivered hereunder or of any equipment used in measuring or determining the nature or quality of such gas, in order that Seller may conveniently have its representative present.

ARTICLE IX

TESTING AND TESTING EQUIPMENT

If it becomes necessary to measure the BTU content of any gas delivered hereunder: Buyer shall install, maintain and operate at its own expense such calorimeters and other instruments as may be necessary for the accurate determinations of quality of the gas delivered hereunder, and will cause such testing equipment to be operated to secure such tests as may be required by Article VII above. Such [fol. 51] testing equipment shall be maintained in accurate calibration by and at the expense of Buyer, and all of the records, data and calculations derived therefrom shall be accessible to inspection and examination by Seller at all reasonable times. Calibration and adjustment of Buyer's equipment shall be done only by Buyer but in the presence of Seller, if Seller so elects.

ARTICLE X

PRICE

(1) Subject to the other provisions hereof, Buyer shall pay Seller for each one thousand (1,000) cubic feet of gas delivered hereunder (or for which payment is due) the prices stated as hereinafter provided. For such purpose the agreement shall be divided into four (4) five (5) year periods; the first being the first five (5) years of the delivery term, and the remainder following successively such first period. The price for gas delivered during the first period (and any period prior to its commence-

ment) shall be seventeen (17) cents; the price for gas delivered during the second period shall be eighteen and one-half (18½) cents; the price for gas delivered during the third period shall be twenty (20) cents; the price for gas delivered during the fourth period shall be twenty-one and one-half (21½) cents.

(2) At least six (6) months prior to the beginning of the third five (5) year period of the delivery term and at least six (6) months prior to the beginning of the fourth five (5) year period of the delivery term, Buyer and Seller shall endeavor to agree upon a renegotiated price to be paid during the succeeding five (5) year period in lieu of the price as provided herein. The parties hereto shall, for each of the periods respectively, upon facts existing six (6) months prior to each such period, determine and fix as the renegotiated price for such ensuing period the average of three (3) prices, each of which gives the highest price provided to be paid by one of the three (3) different purchasers of gas for re-sale in other states for ultimate public consumption paying the highest prices to producers for gas being produced from a field or fields lying wholly or partly within Texas and Beaver Counties, Oklahoma, under agreements arrived at by arm's length bargaining, which agreements are in existence without condition of authorization of any regulatory authority not then granted six (6) months prior to the beginning of [fol. 52] such period, between such producers and such purchasers (non-affiliated with such producers); provided, however, no such agreements shall be considered which provide for a yearly quantity greater than the quantity purchased by Buyer from Seller hereunder during the preceding year. The price so fixed shall be fixed in cents per thousand (1,000) cubic feet for the five (5) year period based upon the determinable prices in such agreements and provided further that such price shall not be less than the price provided for such period herein by Paragraph (1) hereof. In the event the contracts considered in determining the price hereunder contained provisions varying from the corresponding provisions of this agreement with respect to differences in tax allowances, methods of computation of quantities, and any other differences in pres-

sure base or payment for gathering, compression, quality, dehydration or any other matter having a bearing on price, then the variations in such provisions shall be taken into account and appropriate adjustments in the stipulated prices set out in such contracts shall be made to compensate for such variations to arrive at an adjusted price which will cover deliveries and receipt of gas under conditions comparable to those set out herein."

ARTICLE XI

STATEMENTS

(1) On or before the 25th day of each month Buyer will render to Seller a statement for all gas delivered and taken hereunder during the preceding month, according to the measurements, terms, conditions and prices herein provided.

(2) Both Seller and Buyer shall have the right to examine at reasonable times, books, record and charts of the other to the extent necesary to verify the accuracy of any statement, charge or computation made under or pursuant to any of the provisions of this agreement.

ARTICLE XII

PAYMENTS

(1) Buyer agrees to pay to Seller at its address as designated pursuant to paragraph (3) of Article XVIII hereof, on or before the 25th day of each month, for [fol. 53] all the gas delivered and taken hereunder during the preceding month, according to the measurements, terms, conditions and prices herein provided.

(2) Seller agrees to make payment for all royalties due on the gas delivered hereunder.

(3) If Buyer fails to pay all of the amount due for gas delivered hereunder, as herein provided, when such amount is due, interest on the unpaid portion shall accrue at the rate of six per cent (6%) per annum. If such failure to pay continues for thirty (30) days after payment is due, Seller, in addition to any other remedy

which it may have hereunder, may suspend further delivery of gas until such amount is paid; provided, that such provision shall not apply if Buyer's refusal to pay any amount claimed by Seller is the result of a bona fide dispute, and Buyer pays all amounts not in dispute.

(4) Each party hereto shall have the right of all reasonable times to examine the books and records of the other party to the extent necessary to verify the accuracy of any statement, charge, computation or demand made under or pursuant to this agreement. Any statement shall be final as to both parties unless questioned within one (1) year after payment thereof has been made.

ARTICLE XIII

TAXES

(1) The term "tax" as used in this Article XIII shall mean any excise tax (other than ad valorem, income or excess profit taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sale price of the gas in question, provided, however, that the term "tax" shall not be deemed to include any general gross receipts tax, general gross income tax, general occupational or license tax, or general franchise tax imposed on corporations on account of their corporate existence or on their right to do businss within the State as a foreign corporation.

[fol. 54] (2) Subject to the provisions of paragraph (3) of this Article XIII, Seller agrees to pay or cause to be paid all taxes imposed on Seller on or with respect to the gas delivered hereunder prior to its delivery to Buyer, and Buyer agrees to pay or cause to be paid all taxes imposed on Buyer on or with respect to the gas delivered hereunder after its receipt by Buyer.

(3) In the event at any time there is imposed by legislation effective after the date hereof, new or additional taxation upon Seller by reason of the production, severance, gathering, transportation, sale or delivery of gas hereunder, which operates to increase the rate of

taxation, then such increase shall be borne in the proportion of twenty-five per cent (25%) by Seller and seventy-five per cent (75%) by Buyer. It is understood with respect to any such taxes based upon a percentage of value that the provisions of this paragraph (3) will become operative only to the extent that such percentage of value may be increased by legislation above such percentage of value in effect on the date hereof.

(4) The provisions of the preceding paragraph shall apply to eight-eighths (8/8) or one hundred percent (100%) of the gas delivered hereunder.

ARTICLE XIV

WARRANTY OF TITLE—ASSIGNMENT OF RIGHTS

(1) Seller agrees that it hereby does warrant that it will at the time of delivery have good title to all gas delivered by it to Buyer hereunder, free and clear of all liens, encumbrances and claims whatsoever, that it will at such time of delivery have good right and title to sell said gas as aforesaid and that it will indemnify Buyer and save it harmless from all suits, actions, debts, accounts, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties, taxes, license fees, or charges thereon, which are applicable before the title of the gas passes to Buyer. In the event any adverse claim of any character whatsoever is asserted in respect to any of said gas, Buyer may retain the purchase price thereof up to the amount of [fol. 55] such claim without interest until such claim has been finally determined, as security for the performance of Seller's obligations with respect to such claim under this Article XIV, or until Seller shall have furnished bond to Buyer, in an amount and with sureties satisfactory to Buyer, conditioned for the protection of Buyer with respect to such claim. In addition, if Buyer is made the party to any suit, claim or demand in respect of the title to the gas delivered by Seller hereunder, Buyer shall promptly notify Seller thereof and may require Seller to defend the same in its stead; if Seller should fail or refuse to do so, however, Seller shall reim-

burse Buyer for all costs, fees, and other expenses directly incident to Buyer's defense thereof.

(2) In consideration of the fact that Buyer will measure the gas herein provided for at the wellhead and it consequently will be necessary for Buyer to install, read, check and repair meters, Seller hereby transfers, assigns and sets over to Buyer such easements, rights of way and other rights for gathering lines, ingress and egress as are vested in Seller under its several oil and gas leases for such purposes and Buyer shall have the same rights in the premises as Seller for the purposes of this agreement for the term hereof.

ARTICLE XV

FORCE MAJEURE

(1) In the event of either party being rendered wholly or in part by force majeure unable to carry out its obligations under this conrtact other than to make payments of amounts due hereunder, it is agreed that on such party's giving notice and full particulars of such force majeure in writing or by telephone to the other party as soon as possible after the occurrence of the causes relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall, as far as possible, be remedied with all reasonable dispatch.

(2) The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, [fol. 56] earthquakes, fires, storms, floods, washouts, arrest and restraint of rulers and peoples, civil disturbances, explosions, breakage or accident to machinery, necessity of repair or shutouts of wells, gathering system or transportation system, sudden partial or sudden entire failure of natural gas wells, failure to obtain materials and supplies due to governmental regulation, and causes of like or similar kind, whether herein enumerated or not, and not within the control of the party claiming suspension, and

which by the exercise of due diligence such party is unable to overcome.

ARTICLE XVI

TERM

Subject to the termination of this agreement pursuant to the provisions of Article XIX hereof, this Agreement shall be effective from the date hereof, and shall continue until the expiration of twenty (20) years (such period herein referred to as the 'delivery term') commencing on the first day of the month following the first delivery of gas under this Agreement.

ARTICLE XVII

REGULATIONS

Subject to the termination of this agreement pursuant to the provisions of Article XIX hereof, this agreement, insofar as it is affected thereby, shall be subject to all applicable laws, ordinances, rules and regulations, State, Federal or local, and in event this agreement or any provision hereof shall be found contrary to or in conflict with any such law, ordinance, rule or regulation, the latter shall be deemed to control.

ARTICLE XVIII

MISCELLANEOUS

(1) No modification of the terms and provisions of this agreement shall be or become effective except by the execution of supplementary written contracts.

[fol. 57] (2) No waiver by either party of any one or more defaults by the other in the performance of any provisions of this agreement shall operate or be construed as a waiver of any future default or defaults, whether of a like or a different character.

(3) Except as herein otherwise provided, any notice, request, demand, statement or bill provided for in this agreement, or any notice which either party may desire

to give to the other, shall be in writing and shall be considered as duly delivered when mailed by registered mail to the Post Office address of either of the parties hereto, as the case may be, as follows:

BUYER: Natural Gas Pipeline Company of America
122 So. Michigan Avenue
Chicago 3, Illinois

SELLER: TEXACO INC.
P. O. BOX 2420
TULSA, OKLAHOMA

or at such other address as either party shall designate by formal written notice. Routine communications, including monthly statements and payments, shall be considered as duly delivered when mailed by either registered or ordinary mail.

(4) The quantities of gas required to be delivered and received hereunder, as provided in Article II hereof, are computed with respect to the total gas reserves under the unitized area described in Exhibit "A" and Seller's obligations hereunder shall apply only to its undivided interest in such gas reserves.

ARTICLE XIX

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The parties contemplate that Seller requires a Certificate of Public Convenience and Necessity from the Federal Power Commission for the performance of the acts contemplated by the contract; and Seller agrees that it will, pursuant to the rules and regulations of the Federal Power Commission, file within sixty (60) days and prosecute with due diligence its application with the Federal Power Commission for a Cerificate of Public Convenience and Necessity authorizing the performance [fol. 58] of all acts to be performed by it hereunder for which such authorization may be required. Seller shall have the right to refuse any Certificate issued to it on

the grounds that the terms and conditions attached to the issuance thereof or to the exercise of its rights granted thereunder are, in its sole discretion, unreasonable. Should for any reason Certificate be not issued to Seller and accepted by it, on or before August 1, 1962, either party may, by written notice to the other, cancel and terminate this contract at any time prior to consummation of such events.

IN WITNESS WHEREOF, the parties hereto have executed this instrument on the date first above written.

ATTEST:

NATURAL GAS PIPELINE COMPANY OF AMERICA

.....
Secretary

By .....
Executive Vice President

TEXACO INC.

By .....
Attorney-in-Fact

[fol. 59]

STATE OF OKLAHOMA)
COUNTY OF TULSA)

BEFORE ME, a Notary Public in and for said County and State, on this 2nd day of July, 1962, personally appeared O. F. Sebesta, Attorney-In-Fact of Texaco Inc., personally known to me to be such officer and to be the identical person who subscribed the name of the maker thereof to the foreging instrument as its Attorney-In-Fact, and he acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses, purposes and consideration therein set forth.

Given under my hand and seal of office the day and year first above written.

My Commission Expires:
April 28, 1964

/s/ J. F. BADGER
Notary Public in and for
Tulsa County, Oklahoma

STATE OF ILLINOIS)
COUNTY OF COOK)

BEFORE ME, a Notary Public in and for said County and State, on this 1st day of August, 1962, personally appeared M. V. Burlingame, Executive Vice President of Natural Gas Pipeline Company of America, personally known to me to be such officer and to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its Executive Vice President, and he acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses, purposes and consideration therein set forth.

Given under my hand and seal of office the day and year first above written.

My Commission Expires:
February 2, 1963

/s/ [illegible]
Notary Public in and for
Cook County, State of Illinois

[fol. 60] EXHIBIT "A"

ATTACHED TO AND MADE A PART OF GAS PURCHASE AGREEMENT BETWEEN NATURAL GAS PIPELINE COMPANY OF AMERICA AS BUYER AND TEXACO INC. AS SELLER

DATED: MAY 1, 1962

LANDS IN UNIT AREA COVERED BY GAS PURCHASE AGREEMENT

Township 1 N, Range 20 ECM, Beaver County, Oklahoma
All of Section 1

DESCRIPTION OF LEASES:

Lease contributed by Cabot Corporation
Lease No. O-77

Date:	December 21, 1951
Recorded:	Book 124, page 582, Records of the County Clerk, Beaver County, Oklahoma
Lessor:	Floyd A. Kerns and Nora Lee Kerns, his wife; Ivan I. Kerns and Bertha B. Kerns, his wife; Freda V. Kerns, a single woman and Henry H. Kerns, a single man
Lessee:	Cabot Carbon Company
Insofar as same covers:	The NW/4 of Section 1, Township 1 North, Range 20 ECM, Beaver County, Oklahoma

Lease contributed by Texaco Inc.

Date:	June 1, 1956
Recorded:	Book 166, pages 287-290, Records of the County Clerk, Beaver County, Oklahoma

Lessor:	F. A. Kerns and wife, Nora Lee Kerns; Floyd R. Morgan and wife, Mildred Morgan; J. C. Morgan and wife, Annetta Morgan; Willie Sargent and wife, Retha B. Sargent; Wilson R. Morgan and wife, Una Morgan; Jesse Lile and wife, Vada B. Lile; Roy Sargent and wife, Velva V. Sargent; John Cochran and wife, Marion V. Cochran; Calvin B. Morgan and wife, Loretta Morgan; Erma L. Morgan and wife, Fran Morgan
Lessee:	The Texas Company
Covering:	The SE/4 of Section 1, Township 1 North, Range 20ECM, Beaver County, Oklahoma

[fol. 61]

Lease contributed by Sun Oil Company

Date:	July 25, 1949
Recorded:	Book 29, OG, page 67, Records of the County Clerk, Beaver, County, Oklahoma
Lessor:	Walter S. Mills, a single man
Lessee:	Sun Oil Company
Insofar as same covers:	The NE/4 of Section 1, Township 1 North, Range 20 ECM, Beaver County, Oklahoma

Lease contributed by Kingwood Oil Company

Date:	February 2, 1951
Recorded:	Book 33 of OG, pages 342-344, Records of the County Clerk, Beaver County, Oklahoma
Lessor:	John W. Morgan, a widower
Lessee:	The Kingwood Oil Co.
Covering:	The N/2 of the SW/4 of Section 1, Township 1 North, Range 20 ECM, Beaver County, Oklahoma

Lease contributed by Cities Service Petroleum Company

Date:	January 16, 1952
Recorded:	Book 126, page 191, Records of the County Clerk, Beaver County, Oklahoma
Lessor:	Loyd H. Willis and wife, Dorothy Willis, Pearl Aline Layton and husband, M. D. Layton
Original Lessee:	Doyal I. Ely
Insofar as same covers:	The S/2 of the SW/4 of Section 1, Township 1 North, Range 20 ECM, Beaver County, Oklahoma

INTERESTS OF THE PARTIES

Cabot Corporation	25.00625%
Texaco Inc.	24.99687%
Sun Oil Company	25.00000%
Kingwood Oil Company	12.49844%
Cities Service Petroleum Company	12.49844%

[fol. 62]

Address All Communications
To The Secretary

FEDERAL POWER COMMISSION
Washington 25, D.C.

Docket No. CI63-289
Texaco Inc.

Oct. 5, 1962

Texaco Inc.
P. O. Box 2332
Houston, Texas

AIRMAIL

Attention: W. V. Vietti, Manager, Gas Division

Gentlemen:

This is with reference to your letter of August 27, 1962, submitting for filing as a proposed rate schedule a contract dated May 1, 1962, between your company and Natural Gas Pipeline Company of America covering a proposed sale of natural gas from the Camrick Southeast Field, Beaver County, Oklahoma, together with a related certificate application in Docket No. CI63-289.

A review of the contract discloses that it contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's regulations. Therefore, in accordance with Commission Order No. 242, issued February 8, 1962, (copy enclosed) and Section 154.100 of the regulations, the proposed rate schedule and related certificate application are hereby rejected. All available copies are returned herewith. Such rejection is without prejudice to the submittal in conformity with the Commission's rules and regulations of three copies of the proposed rate schedule and one original and seven copies

of the related certificate application which do not contain the objectionable pricing provisions.

Very truly yours,

/s/ J. H. Gutride
Secretary

P. F. SCHLICHER, Attorney
Texaco Inc.
135 East 42nd Street
New York 17, New York

Enclosure No. 6557

cc: Natural Gas Pipeline
Company of America
122 South Michigan Avenue
Chicago 3, Illinois

O. F. Sebesta, Division
Manager
Texaco Inc.
P. O. Box 2420
Tulsa 2, Oklahoma

[fol. 63]

BEFORE THE FEDERAL POWER COMMISSION

Docket No. CI63-289

In the Matter of)
TEXACO INC.)

APPLICATION FOR REHEARING OF COMMISSION ORDER OF OCTOBER 5, 1962 REJECTING FILINGS

Texaco Inc. (Texaco), pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, petitions the Commission for rehearing of its order of October 5, 1962 which rejected filings submitted by Texaco. Rehearing and reconsideration are requested on the following grounds:

I.

STATEMENT OF THE PROCEEDINGS

Under cover of its letter of August 27, 1962, Texaco submitted to the Commission an application for a certificate of public convenience and necessity, and a copy of a proposed rate schedule, including, *inter alia*, a copy of a contract dated May 1, 1962 with Natural Gas Pipeline Company of America (Natural). These documents were received by the Commission on September 4, 1962 and Texaco's application was docketed as No. CI63-289. The contract of May 1, 1962 provides for sales of natural gas over a period of twenty (20) years, and in Article X the contract provides for certain specific price increases at the beginning of the last three of the four five-year periods into which the contract term is divided. Article X also provides that Texaco and Natural will, during certain of these periods, undertake price renegotiation.[1]

[1] Six months prior to the beginning of the third and fourth five-year periods, the renegotiated price will be determined on the average of the highest price (in existence without condition of

[fol. 64] With its application for a certificate of public convenience and necessity, Texaco also filed notice of its intention to commence sales under the May 1, 1962 contract pursuant to Section 157.28 of the Commission's Regulations under the Natural Gas Act and, pursuant to that Regulation, Texaco set forth the reasons for the need to commence immediate sales of gas produced from the properties committed to the contract, which properties are located in the Camrick Southeast Field, Beaver County, Oklahoma.

A letter dated October 5, 1962, and issued "in accordance with the Commission's Order No. 242, issued February 8, 1962," stated that "a review of the contract discloses that it contains pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's Regulations." The letter order went on to state, "The proposed rate schedule and related certificate application are hereby rejected."

II.

GROUNDS UPON WHICH RELIEF IS SOUGHT

The Commission order of October 5, 1962, and the therein sought implementation of the Commission's Order Nos. 242 and 232A is erroneous and illegal because:

A. The summary rejection, without notice of hearing of Texaco's application for a certificate of public convenience and necessity, is a violation of Section 7(c) of the Natural Gas Act.

B. The rejection is also violative of Sections 4 and 5 of the Act which prohibit summary proceedings.

C. The Commission's order of October 5, 1962, in the referenced docket, is not supported by substantial evi-

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authorization) being paid by each of the three other interstate pipeline purchasers for purchases from fields wholly or partly within Texas and Beaver Counties, Oklahoma, adjusted if necessary ". . . to arrive at an adjusted price which will cover deliveries and receipt of gas under conditions comparable to those . . ." to be made under the May 1, 1962 contract. The renegotiated price shall not be effective if it is less than the specified contract price applicable for that period.

dence and findings in the instant docket as required by Constitutional due process provisions, the Natural Gas Act and the Administrative Procedure Act.

D. The order of October 5, 1962 is unreasonable, arbitrary, capricious, and discriminatory as to Texaco in light of Texaco's rights under the Natural Gas Act and the [fol. 65] Commission's treatment of other natural gas companies.

E. The Commission's order of October 5, 1962, rejecting Texaco's application for a certificate of public convenience and necessity, and Texaco's proposed rate schedule, is unlawful because it is based on illegal regulations. The order of October 5, 1962 rejected Texaco's application and its rate schedule because the contract contained pricing provisions other than those directed by Section 154.93 of the Commission's Regulations and because, under Section 154.100 of the Commission's Regulations (and its Order No. 242), any contracts executed on or after April 2, 1962 containing other than the permitted price provisions are to be rejected.

The portions of the Commission's Regulations relied upon for the rejection of Texaco's filings were adopted as the result of separate orders of the Commission issued without any evidentiary hearing regarding the necessity, propriety or lawfulness of such regulations. The orders initiating the changes in Regulations were entered over the written protests of Texaco and other producers, both before the Commission and before the courts.

The orders and the regulations promulgated in accordance with Order Nos. 242 and 232A, relied upon by the Commission, and enforced by the order of October 5, 1962, are themselves unlawful for each of the following reasons:

(1) They exceed the authority delegated to the Commission under the terms of the Natural Gas Act in that they are neither necessary nor appropriate to the administration of the Act.

(2) These regulations totally circumvent the statutory scheme set forth by Congress in the Natural Gas Act and recognized by the Supreme Court in its decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co.* v. *Memphis*

Gas, Light & Water Division, 358 U.S. 103 (1958). They deprive Texaco and its purchaser of the statutory and Constitutional right to establish the terms, provisions and conditions under which natural gas is to be sold in interstate commerce for resale, subject only to the review powers granted the Commission.

[fol. 66] (3) Order Nos. 242 and 232A are in direct violation of the Natural Gas Act itself in that Sections 4, 5 and 7 of the Natural Gas Act provide the standards under which rate filings are to be reviewed and certificate applications are to be considered.

(4) They are violative of the provisions of Sections 5 and 7 of the Administrative Procedure Act.

(5) They are in violation of the Fifth Amendment to the Constitution of the United States in that they deprive Texaco of due process of law.

(6) They are unreasonable, arbitrary and capricious.

(7) They are discriminatory and arbitrary, and therefore unlawful, in that their application will, as in this case, permit other sellers of gas from the same field to have and employ pricing provisions which have herein been denied to Texaco.

(8) They are arbitrary and capricious in that they are discriminatory against Texaco in the light of regulations permitting indefinite price filings by other natural gas companies.

(9) They amount to a prejudgment of the lawfulness of the rates which might be filed in the future and preclude such filing and the right to test the lawfulness thereof.

WHEREFORE, Texaco Inc. respectfully requests that this Commission desist from the application of its unlawful regulations to Texaco, modify its letter order of October 5, 1962, and allow Texaco to file its rate schedule and application for a certificate.

Respectfully submitted:

TEXACO INC.
ALFRED C. DECRANE, JR.
JAMES J. FLOOD, JR.
P. O. Box 2332
Houston 1, Texas

By Signed: Alfred C. DeCrane, Jr.
ALFRED C. DECRANE, JR.
Attorney for Texaco Inc.

[fol. 67] • • •

[fol. 68]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross and Harold C. Woodward.

Texaco Inc. Docket No. CI63-289

ORDER DENYING REHEARING—Issued November 30, 1962

Texaco Inc. (Texaco), under cover of its letter of August 27, 1962 submitted to the Commission an application for a certificate of public convenience and necessity, and a copy of a proposed rate schedule, including a copy of a contract dated May 1, 1962 with Natural Gas Pipeline Company of America.

The Commission by letter order dated October 5, 1962, rejected Texaco's proposed rate schedule and related certificate application on the grounds that contract contained pricing provisions other than the permissible provisions set forth in Section 154.93 of the Commission's regulations. This action was consistent with the Commission's Order No. 242, issued on February 8, 1962.

On November 1, 1962, Texaco filed an Application for Rehearing of the above-mentioned Commission Order of October 5, 1962. Texaco therein generally alleges that the Commission's regulations promulgated in accordance with Order Nos. 242 and 232A are unlawful on numerous grounds including, *inter alia*, the fact that the Commission exceeded the authority delegated to it under the Natural Gas Act in amending its Regulations in accordance with these orders. Texaco also alleges that the Commission's rejection of its application in Docket No. CI63-289 and related rate schedule was tantamount to a summary rejection and therefore unlawful under the provisions of the Natural Gas Act.

In its application for rehearing Texaco attacks primarily the validity of Orders Nos. 242 and 232A, pursuant to

which the action rejecting the filing in Docket No. CI63-289 was taken.

[fol. 69] Notices of Proposed Rule Making were issued by the Commission in Docket No. R-153 on April 2, 1956 and in Docket No. R-203 on October 10, 1961. The latter proceedings culminated in Order Nos. 232A and 242, respectively. All interested parties were afforded the opportunity to file appropriate written comments on these proposed rules. After giving careful consideration to the responses filed in Docket Nos. R-153 and R-203, the Commission was of the view that Order Nos. 232A and 242 and the regulation promulgated thereby were essential to the appropriate administration of the Natural Gas Act. The Commission therefore reaffirms the propriety of these orders and the action taken thereunder in connection with Texaco's proposed rate schedule and related application filed in Docket No. CI63-289.

The Commission Orders:

That the application for Rehearing filed by Texaco Inc. in Docket No. CI63-289 be and hereby is denied.

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

[Clerk's Certificate omitted in printing]

[fol. 70]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Title Omitted]

[File Endorsement Omitted]

RESPONDENT'S ANSWER TO MOTION FOR CONSOLIDATION FOR PURPOSES OF ORAL ARGUMENT, ETC.

AND

RESPONDENT'S MOTION TO DISMISS FOR LACK OF PROPER VENUE—Filed December 14, 1962

Respondent Federal Power Commission requests that action on petitioner's motion be postponed. While we intend to cooperate with petitioner to have No. 7217 ready for argument at the March session of this Court when *Pan American Petroleum Corporation* v. *F.P.C.*, No. 7002, now consolidated with *Sun Oil Co.* v. *F.P.C.*, No. 7179, will be ready for argument, we believe it premature to decide prior to the filing of the briefs whether argument on Texaco's petition for review in No. 7271 should be consolidated for argument or merely heard at the same time.

With respect to petitioner's other procedural suggestions, we have no objection to its reliance on the statement of facts in its Petition for Review and to its use of Pan American's initial brief in No. 7002 as its own initial brief or to the filing of a reply brief after our brief is filed.

As petitioner anticipated, we believe that its petition in No. 7217 should be dismissed for lack of proper venue and we hereby formally raise that objection. For the reasons [fol. 71] fully set forth in our motion to dismiss No. 7135, pp. 8-13, we believe that Texaco is not "located" within this Circuit though that is the criterion on which it bases its claim to venue under Section 19(b) of the Natural Gas Act. 15 U.S.C. 717r(b). Since disposition of the same issue raised by separate motions to dismiss in *Texaco Inc.* v. *F.P.C.*, Nos. 6947 and 7135, now pending, has been post-

poned until after hearing on the merits, we suggest that our present motion to dismiss for venue be similarly deferred until a hearing on the merits. In making substantially the same suggestion petitioner proposes that an order be entered that "any question of the propriety of venue in these matters" should be governed by the ruling in Nos. 6947 and 7135. We object to this proposed language because it is inadequate to achieve the objective inasmuch as the Court might choose to dismiss those earlier petitions for lack of jurisdiction without reaching the venue objection, an alternative not available here.

Respectfully submitted,

/s/ Howard E. Wahrenbrock
HOWARD E. WAHRENBROCK
Solicitor

/s/ Peter H. Schiff
PETER H. SCHIFF
Attorney

December 12, 1962
Federal Power Commission
Washington 25, D. C.

[fol. 72]

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. 78]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 7303

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

vs.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

MOTION FOR ORDER CONSOLIDATING CASES

MOTION FOR ORDER REQUIRING IMMEDIATE CERTIFICATION OF RECORD—FILED MARCH 8, 1963

To: The Honorable, the Chief Judge and Judges of the United States Court of Appeals for the Tenth Circuit:

Pan American Petroleum Corporation (Petitioner) hereby petitions this Honorable Court for review of Federal Power Commission (Respondent, Commission) Order No. 242 issued February 8, 1962, as subsequently formally executed by issuance of the Commission February 19, 1963, Letter Order in Docket No. CI63-867, and respectfully moves the Court for an order consolidating this case with Case No. 7002 pending in this Court and requiring immediate certification of the record.

This petition for review is filed pursuant to the provisions of Section 19(b) of the Natural Gas Act (Act) (52 Stat. 831), 15 U.S.C. § 717r(b); and Rule 34 of the Rules of this Court.

[fol. 74]

STATEMENT OF THE CASE

By notice issued April 4, 1956, in Docket No. R-153, the Commission proposed issuance of an order providing

that, after July 1, 1956, all independent producer gas sales contracts containing certain "indefinite" change in price provisions will not be accepted for filing under Section 4 of the Natural Gas Act. Petitioner, then Stanolind Oil and Gas Company, on June 1, 1956, filed its letter dated May 24, 1956, opposing issuance of the proposed rule. Thereafter, the Commission, on March 3, 1961, issued its Order No. 232, providing that "indefinite" change in price provisions in all independent producer contracts *tendered for filing* on and after April 3, 1961, shall be *inoperative* and of *no effect at law*. On March 20, 1961, and pursuant to ordering paragraph (B) of Order No. 232, Petitioner filed with the Commission its views and comments in opposition to Order No. 232. Subsequently, on March 28, 1961, Petitioner filed its application for rehearing upon Order No. 232.

On March 31, 1961, the Commission issued its Order No. 232-A modifying its Order No. 232 to provide that "indefinite" change in price provisions in all independent producer contracts *executed* on or after April 3, 1961, shall be *inoperative* and of *no effect at law*. On April 26, 1961, Petitioner filed its application for rehearing upon Commission Order No. 232-A. In each of the foregoing applications for rehearing, Petitioner contended that Orders Nos. 232 and 232-A are invalid and unlawful in particulars, *inter alia*, hereinafter stated as grounds upon which relief is requested in this case. By Letter Orders issued May 4, 1961, and May 5, 1961, the Commission rejected Petitioner's applications for rehearing upon the ground that "application for rehearing [upon these orders] does not lie under Section 19 of the Natural Gas Act."

Thereafter, by Notice of Proposed Rulemaking, issued on October 10, 1961, in Docket No. R-203, the Commission proposed the issuance of an order providing for *rejection of all rate schedules and applications for certificates of public convenience and necessity filed by independent producers* which are supported by contracts which contain "indefinite" change in price provisions [fol. 75] that the Commission declared to be "inoperative and of no effect at law" in its Order No. 232-A, and also providing that such independent producer contracts shall

not, upon applications for certificates of public convenience and necessity by interstate pipe lines, be considered in support of the applicant's gas supply. Petitioner filed extensive views and comments in which it argued that the proposed order would be even more unlawful and in excess of the Commission's authority than Order No. 232, as modified by Order No. 232-A.

Subsequently, on February 8, 1962, the Commission issued its Order No. 242, in Docket No. R-203, Appendix pp. 1a-2a, in which it ordered *rejection of producer rate schedules and applications for certificates of public convenience and necessity* which are supported by contracts *executed* on or after April 2, 1962, that contain "indefinite" change in price provisions which Order No. 232-A, declares to be invalid and of no effect at law, and also provided that *such contracts filed in support of interstate pipe line company certificate applications will be given no consideration in determining the adequacy of the pipe line company's gas supply.* Thereafter, on March 7, 1962, Petitioner filed its application for rehearing upon Order No. 242, stating that in the particulars, *inter alia*, as hereinafter set forth as the ground upon which relief is requested in this case, Order No. 242 is unlawful and invalid.

On April 4, 1962, the Commission issued its order denying Petitioner's application for rehearing. Subsequently, Petitioner duly filed in this Court a Petition for review of Order No. 242. Such review is pending in *Pan American Petroleum Corp.* v. *FPC*, Case No. 7002.

Under the date October 4, 1962, Petitioner and Colorado Interstate Gas Company (Colorado Interstate) entered into a contract for the sale of gas from Petitioner's reserves in the Beaver Creek Field, Fremont County, Wyoming. Paragraph 5.1 of such contract provides that the price for the gas is 17.5¢ per Mcf through September 30, 1968, 18.5¢ per Mcf during the period October 1, 1968, through September 30, 1973, 19.5¢ per Mcf during the period October 1, 1973, through September 30, 1978, and 20.5¢ per Mcf during the period October 1, 1978, through September 30, 1983, Appendix pg. 7a. This [fol. 76] contract price changing provision constitutes a so-called "definite price changing clause." Paragraph 5.1

of the contract further provides that, commencing October 1, 1983, the contract price for each five-year period shall be the fair market price determined and negotiated by the purchaser and seller at the beginning of each such five-year period, Appendix pp. 7a-8a. This latter contract price changing provision constitutes a so-called "indefinite or flexible price changing clause."

On or about January 16, 1963, Petitioner filed with the Commission under Section 7(c) of the Act, 115 USC § 717f(c), its application for a certificate of public convenience and necessity covering such sale of gas. By Letter Order issued February 19, 1963, in Docket No. CI63-867, Appendix pg. 9a, the Commission rejected and returned to Petitioner, Petitioner's certificate application. As its basis for such action, the Commission stated that, because Petitioner's October 4, 1962, contract contains price changing provisions which violate Order No. 232-A, Order No. 242 requires that the certificate application be rejected. The sections of the Commission's Regulations constituting Orders Nos. 232-A and 242 and referred to in the February 19, 1963, Letter Order are reproduced in the Appendix, pg. 1a.

On March 4, 1963, Petitioner filed its petition for review in *Pan American Petroleum Corp.* v. *FPC*, Case No. 7300 in this Court. On the same date petitioner filed with Respondent a further application for rehearing upon Order No. 242, making reference to the February 19, 1963, Letter Order execution thereof, Appendix pp. 11a-18a. By order issued March 6, 1963, Appendix pp. 19a-20a, Respondent denied Petitioner's application for rehearing.

Petitioner desires that this case be consolidated for argument on March 18, 1963, with Case No. 7002, and hereby adopts as its briefs in this case the briefs filed by Petitioner in Case No. 7002.

VENUE

Section 19 (b) of the Act provides that petitions for review of Commission orders may be filed in the United States Court of Appeals for any circuit wherein the petitioner is [fol. 77] located or has its principal place of business. Pe-

titioner is located and has its principal place of business at 511 South Boston Avenue, Tulsa, Oklahoma.

JURISDICTIONAL STATEMENT

As Respondent recognizes in its briefs in *Pan American Petroleum Corp.* v. *FPC*, Case No. 7002, and *Texaco Inc.* v. *FPC*, Case No. 7217 in this Court, and in its February 19, 1963, Letter Order, the substantive decision which is the issue on review in the instant case is the substantive decision made by the Commission when it issued Order No. 242. The February 19, 1963, Letter Order is merely ministerial execution of such substantive decision. Court decision that Order No. 242 is invalid as being out of harmony with the Act would mean that Order No. 242 is a mere nullity and the February 19, 1963, ministerial execution thereof is also a nullity. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129 (1936).

In its briefs in support of its Motion to Dismiss in Case No. 7002, Respondent argues that such ministerial executions of Order No. 242 make Order No. 242 aggrieve Petitioner so as to entitle Petitioner to judicial review of Order No. 242. Even under Respondent's conception of parties aggrieved, Petitioner is a party sufficiently aggrieved by the issuance of Order No. 242 as to be entitled to prompt judicial review thereof.

On March 7, 1962, Petitioner applied for rehearing upon Order No. 242 (Case No. 7002, R. 290-318), and by order issued April 4, 1962, Respondent denied Petitioner's application for rehearing (Case No. 7002, R. 388-389). On March 4, 1963 Petitioner filed a further application for rehearing upon Order No. 242, making reference to the February 19, 1963, ministerial execution thereof, Appendix pp. 11a-18a. By Order issued March 6, 1963, Appendix pp. 19a-20a, Respondent denied such application for rehearing.

GROUNDS UPON WHICH RELIEF IS SOUGHT

1. Petitioner submits that Respondent's Order No. 242, executed against Petitioner's contract on February 19, [fol. 78] 1963, in Docket No. CI63-867, is erroneous, invalid, and unlawful in the following particulars:

a. *Order No. 242 regulates matters which are outside the scope of Respondent's regulatory authority.*

(1) The formulation by natural gas companies of contract pricing provisions is outside the scope of the Act, and, therefore, outside the scope of the regulatory authority delegated to Respondent under the Act. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, et al.*, 358 U.S. 103 (1958).

(2) Section 16 of the Act, 15 U.S.C. § 717o, does not authorize Respondent to issue orders regulating matters which are outside the scope of its delegated regulatory authority. *FPC* v. *Panhandle Eastern Pipe Line Co., et al.*, 337 U.S. 498 (1949); *Willmut Gas & Oil Co.* v. *FPC*, 294 F. 2d 245 (D.C. Cir. 1961); and Section 9(a) of the Administrative Procedure Act, 5 U.S.C. § 1008(a).

(3) Order No. 242 constitutes formal substantive regulation of the formulation of contract price changing provisions, and is, therefore, in excess of Respondent's regulatory authority and unlawful.

b. *Order No. 242 violates Sections 4, 5 and 7 of the Act, 15 U.S.C. § 717c, d & f, Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004 & 1006, and Amendment V of the Constitution.*

(1) Sections 4, 5 and 7 of the Act provide that contract rates may be disallowed and certificate applications denied only after hearings and findings that the specific rates or the specific gas sales proposed are not consistent with the regulatory standards prescribed in such statutory provisions. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water*

Division, et al., Supra, and *Atlantic Refining Co.* v. *Public Service Comm'n.*, 360 U.S. 378 (1959).

(2) Order No. 242 operates to disallow contract rates and reject certificate applications without such [fol. 79] required statutory hearings and findings.

(3) Section 16 of the Act does not authorize nullification or avoidance of such statutory requirements. *Mississippi River Fuel Corp.* v. *FPC*, 202 F. 2d 899 (3rd Cir. 1953); *The Pure Oil Co.* v. *FPC*, 292 F. 2d 350 (7th Cir. 1961); *Phillips Petroleum Co.* v. *FPC*, 258 F. 2d 906 (10th Cir. 1958); and Administrative Procedure Act, Sections 5 and 7.

c. *The issuance of Order No. 242 is not supported by facts or findings of facts.*

d. *Order No. 242 and the February 19, 1963, enforcement thereof against Petitioner's contract are unduly discriminatory, unreasonable, arbitrary and capricious.*

(1) There is no reasonable basis for Respondent's conclusion that flexible forward pricing is necessary and proper with respect to Colorado Interstate but unnecessary and improper with respect to Petitioner.

(2) There is no reasonable basis for Respondent's supposition that its regulatory difficulties are traceable to flexible forward pricing in producer sales instead of Respondent's failure to establish regulatory criteria applicable to adjudications of the reasonableness of Petitioner's rates in the same manner as Respondent has established criteria applicable to adjudications of the reasonableness of Colorado Interstate's rates.

(3) There is no reasonable relation between the pricing clauses in Petitioner's contract, Appendix pp. 7a-8a, and the suppositions and conclusions recited in Order No. 242 (Case No. 7002, R. 277-279).

2. Petitioner submits that this case should be consolidated with Case No. 7002 for oral argument before the Court on March 18, 1963.

a. Petitioner adopts as its briefs in this case, its briefs in Case No. 7002. The issue under review in each case is whether Order No. 242 is invalid.

[fol. 80] b. Prompt judicial review of Order No. 242 is necessary to avoid further disruption of Petitioner's business operations and to reduce the confusion and uncertainty respecting Respondent's regulation of Petitioner's rates.

c. Such consolidation for oral argument will save time and expense of the Court and the parties.

3. Petitioner submits that the Court should order immediate certification of the record.

a. Based upon Respondent's determination of the record in *Pan American Petroleum Corp.* v. *FPC*, Case No. 6973 pending in this Court, Petitioner submits that the record in the instant case consists of two instruments:

(1) Petitioner's application for certificate of public convenience and necessity and exhibits, and

(2) Respondent's February 19, 1963, Letter Order in Docket No. CI63-867.

The portions of such instruments that Petitioner designates for printing are reproduced in the Appendix, pp. 3a-10a. Petitioner's March 4, 1963 application for rehearing and Respondent's March 6, 1963 order denying application for rehearing are printed, Appendix pp. 11a-20a.

b. Petitioner respectfully requests that neither the filing of this Petition for Review nor delays in certification of the record in this case result in postponement of oral argument in Cases Nos. 6973 and 7002 docketed for March 18, 1963, but that these cases be argued on March 18, 1963, regardless.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for review of Respondent's Order No. 242 with reference to execution thereof against Petitioner's contract by Letter Order issued February 19, 1963, and that the Court enter an order consolidating this case for argument on March 18, 1963, with Case No. 7002 and requiring Respondent to immediately certify and file the record, and, further, that [fol. 81] upon review by the Court, the Court enter an

order directing Respondent to vacate and set aside its Order No. 242.

Respectfully submitted,

J. P. HAMMOND
WILLIAM H. EMERSON
P. O. Box 591
Tulsa 2, Oklahoma

THOMAS J. FILES
P. O. Box 40
Casper, Wyoming

WILLIAM J. GROVE
CARROLL L. GILLIAM
600 Munsey Building
Washington 4, D. C.

Attorneys for Petitioner

PAN AMERICAN PETROLEUM CORPORATION

OF COUNSEL:

DOW, LOHNES AND ALBERTSON
600 Munsey Building
Washington 4, D. C.

March 7, 1963

[fol. 82]

RECORD BEFORE FEDERAL POWER COMMISSION

Pan American Contract No. 49,928
Beaver Creek Field
Fremont County
WYOMING

BEFORE THE FEDERAL POWER COMMISSION

Docket No. .....

In the Matter of the Application under the Natural Gas Act of Pan American Petroleum Corporation for a Certificate of Public Convenience and Necessity.

APPLICATION

Applicant states:

1. That Applicant's exact legal name is Pan American Petroleum Corporation.

2. That Applicant is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at 511 South Boston Avenue, Tulsa 3, Oklahoma.

3. That Applicant is authorized to do business in the States of Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah and Wyoming.

4. That orders, correspondence and communications regarding this Application are to be addressed to the following:

Joe P. Hammond, General Attorney
Pan American Petroleum Corporation
Post Office Box 591
Tulsa 2, Oklahoma

Harold H. Young, Jr., Attorney
Pan American Petroleum Corporation
Post Office Box 40
Casper, Wyoming

[fol. 83] and,

William J. Grove, Esq.
Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.

5. That the proposed sale and the pertinent facts with respect thereto are as follows:

a) Applicant proposes to sell natural gas to Colorado Interstate Gas Company under and in accordance with the terms and conditions of a Gas Sales Contract, dated October 4, 1962, as amended, between Applicant, as Seller, and Colorado Interstate Gas Company, as Buyer, in the quantities specified in said Contract. A true and correct copy of said Gas Sales Contract which sets forth the terms and conditions of the proposed sale is attached hereto, marked Exhibit "B" and made a part hereof. A true and correct copy of an Amendment to said Contract, dated November 28, 1962, between the parties to said Contract, is attached hereto, marked Exhibit "B-1," and made a part hereof.

As required by Section 157.24(a) (5) of the Commission's regulations, a summary of a few of the provisions of said contract, on the form prescribed in Section 250.5 of the Commission's regulations, is attached hereto, marked Exhibit "C" and made a part hereof.

b) The source of the gas sold pursuant to the terms of the above contract is Applicant's share of gas produced from or attributed to the acreage in the Beaver Creek Field, Fremont County, Wyoming, described in Exhibit "B" to the said Gas Contract, insofar as such gas originates from the Phosphoria Formation underlying such lands, to the extent specifically covered by said contract as now written or as subsequently amended by mutual agreement of the parties thereto.

c) The gas involved herein will be delivered at a mutually agreeable point at the discharge side of Applicant's

processing plant located in the field where the gas was produced.

[fol. 84] d) The sale of natural gas involved herein will not be accomplished by means of a pipe line or pipe lines.

e) Applicant did not on June 7, 1954, and does not now, serve any communities at wholesale or retail.

f) Applicant did not on June 7, 1954, and does not now, serve any main line industrial customers.

g) Applicant's major appurtenant properties and facilities are as follows: dehyrators or line heaters, lease separation facilities, and the processing plant located in the field.

6. That attached hereto, marked Exhibit "A" and made by reference a part hereof, is a key map of the facilities of Applicant which will be in use in connection with the production and gathering of the gas covered hereby. The facilities shown on said map are production and gathering facilities. The inclusion of the same shall be deemed to be merely for the purpose of complying with the regulations of the Commission, and not for the purpose of requesting a Certificate of Public Convenience and Necessity therefor.

7. That this Application covers only the sale of Applicant's share of gas made under and pursuant to the terms of the Gas Sales Contract and Amendment thereto referred to in paragraph 5 (a) hereof, as subsequently amended by mutual agreement of the parties, and then only to the extent, if any, that such sale may be held to be a sale in interstate commerce for resale, and this Application is specifically limited to such sale.

8. That this Application shall not be deemed to involve a request for a Certificate of Public Convenience and Necessity broader in scope than the prayer hereof.

9. That all facilities maintained and operated by Applicant in connection with the gas covered hereby are production or gathering facilities, and said facilities and the operations performed thereby or in connection herewith are exempt from regulation by the Commission under the Natural Gas Act.

[fol. 85] WHEREFORE, Applicant prays that the Commission issue to Applicant a Certificate of Public Convenience and Necessity authorizing Applicant to sell natural gas, under and in accordance with the terms and conditions of the sales contract and amendment referred to in paragraph 5 (a) hereof as now written or as subsequently amended by mutual agreement of the parties thereto.

Signed at Casper, Wyoming, this 14th day of January, 1963.

PAN AMERICAN PETROLEUM CORPORATION

By /s/ Harold H. Young, Jr.

Its Attorney
Post Office Box 40
Casper, Wyoming

[fol. 86]

Form CIG 85
(Revised 10-1-58)

EXHIBIT "B" TO APPLICATION

CONTRACT NO. 256-A

GAS PURCHASE AGREEMENT

between

Colorado Interstate Gas Company,
Buyer,

and

Pan American Petroleum Corporation,
Seller.

Dated October 4, 1962

WYOMING—WIND RIVER BASIN
BEAVER CREEK FIELD

(Phosphoria Formation Only)

ARTICLE V—PRICE

5.1 *Price*—For all gas delivered to Buyer by Seller hereunder the price per Mcf shall be as follows:

(a) For the period commencing with the effective date hereof and continuing thereafter through September 30, 1968 ..... 17.5¢

(b) For the period commencing with October 1, 1968, and continuing thereafter through September 30, 1973 ..... 18.5¢

(c) For the period commencing with October 1, 1973, and continuing thereafter through September 30, 1978 ..... 19.5¢

(d) For the period commencing with October 1, 1978, and continuing thereafter through September 30, 1983 ..... 20.5¢

(e) For each five-year period after that specified in (d) above, the price for the sale of gas hereunder shall be the fair market price established as of the beginning of each such period but in no event shall be less than 20.5¢. Representatives of each of the parties hereto shall meet for the purpose of estab-
[fol. 87] lishing such fair market price six months prior to the end of the five-year period specified in (d) above and six months prior to the end of each five-year period thereafter during the term hereof. In the establishment of the fair market price for the sale of gas hereunder, the parties shall consider along with other relevant factors, quality, quantity, delivery pressure and delivery point, and the prices other major pipeline companies are paying for gas in the general area under agreements which at that time have been recently negotiated or renegotiated.

In the event the parties hereto fail to agree as to the price prior to the beginning of any price period after that specified in (d) above, Seller shall continue to deliver gas hereunder and Buyer shall continue to pay Seller a price equal to the price in effect prior to the beginning of such period or 20.5¢, whichever is the greater, during the period of time the price remains in dispute, subject to retroactive adjustment based on the price when subsequently established.

ARTICLE VI—TERM

6.1 This Agreement shall become effective on date hereof, and shall remain in full force for a term of 20 years and so long thereafter as gas is capable of being produced in commercial quantities from the oil and gas leases and gas rights committed to the performance of this Agreement.

• • • •

[fol. 88]

ADDRESS ALL COMMUNICATIONS
TO THE SECRETARY

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

Docket No. CI63-867
Pan American Petroleum Corporation

February 19, 1963

Pan American Petroleum Corporation
P. O. Box 40
Casper, Wyoming

Attention: Mr. Harold H. Young, Jr.

Gentlemen:

This is with reference to your letter of January 14, 1963, submitting an application for certificate of public convenience and necessity, assigned Docket No. CI63-867, for proposed sales of gas to Colorado Interstate Gas Company from the Beaver Creek Field (Phosphoria Formation), Fremont County, Wyoming.

The sales are proposed to be made pursuant to a contract dated October 4, 1962, attached as an exhibit to your certificate application. The contract incorporates pricing provisions other than those permitted by Section 154.93 of the Commission's Regulations. Therefore, in accordance with Sections 154.93 and 154.100 of the Regulations, your certificate application and exhibits thereto are hereby rejected. All available copies are returned herewith.

This rejection is without prejudice to the resubmittal of an original and seven copies of your application and ex-

hibits thereto which do not contain the unacceptable pricing provisions.

Very truly yours,

/s/ J. H. Gutride
Secretary

[fol. 89] Enclosure No. 1226

cc: Colorado Interstate Gas Company
P. O. Box 1087
Colorado Springs, Colorado

Joe P. Hammond, General Attorney
Pan American Petroleum Corporation
P. O. Box 591
Tulsa 2, Oklahoma

William J. Grove, Esq.
Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.

[fol. 90]

Before the

FEDERAL POWER COMMISSION

Docket No. CI63-867

In the Matter of

PAN AMERICAN PETROLEUM CORPORATION

APPLICATION FOR REHEARING

Pursuant to Section 19(a) of the Natural Gas Act (Act), 58 Stat. 831, 15 U.S.C. § 717r(a), Pan American Petroleum Corporation (Pan American) hereby applies for rehearing upon Order No. 242 issued on February 8, 1962, and the enforcement thereof, by Letter Order issued February 19, 1963, in Docket No. CI63-867, respecting Pan American's October 4, 1962, contract with Colorado Interstate Gas Company.

STATEMENT OF ERRORS

The issuance of Order No. 242 and the February 19, 1963, application thereof to Pan American's October 4, 1962, contract constitute Federal Power Commission (Commission) action that is not authorized by the Act, and that violates the Constitution and laws of the United States:

1. The purported standards, "adverse to the public interest" and "making the tasks of regulation more manageable," are not regulatory standards prescribed in Sections 4, 5 or 7 of the Act, or standards under which the Commission can deprive Pan American of its contract rights and contract rates.

2. Order No. 242 and its February 19, 1963, enforcement against Pan American's contract deprive Pan American of its rights under procedural due process of law

and substantive due process of law. Such orders and the procedure under which they were issued violate the Natural Gas Act and Sections 5 and 7 of the Administrative Procedure Act, 5 U.S.C. §§ 1004 and 1006, and Amendment V to the Constitution of the United States. [fol. 91] 3. The Commission does not have authority under Section 16 of the Act to prohibit Pan American from filing gas sales proposals and rate change proposals with the Commission for hearing and determination as to whether such sales and rates satisfy the regulatory standards prescribed in Sections 4 and 7 of the Act.

4. The Commission does not have authority under Section 16 of the Act to make, without hearings and findings, the substantive rate regulatory adjudications and decisions that, under Sections 4, 5, and 7 of the Act, must be made upon notice, findings and hearings.

5. By its Order No. 242 and February 19, 1963, Letter Order, the Commission deprives Pan American of the hearings and findings upon which it is entitled under Sections 4, 5, and 7 of the Act to have regulatory adjudications made respecting its contract rates.

6. Order No. 242 is discriminatory and is not supported by facts and findings of fact and conclusions of law showing that such discrimination is lawful or permitted under the regulatory standards prescribed by the Act.

7. Order No. 242 is not supported by findings of subsidiary and ultimate facts showing that summary rejection of certificate applications supported by contracts containing flexible pricing clauses is either necessary or proper to carry out the provisions of Sections 4, 5, or 7 of the Act.

8. Order No. 242 is neither necessary nor appropriate to carry out the provisions of the Act, and is unjust and unreasonable, arbitrary and capricious.

STATEMENT OF THE CASE

By Order No. 232, issued March 3, 1961, in Docket No. R-153, as amended by Order No. 232-A, issued March 31, 1961, the Commission entered a substantive rate regulatory decision that so-called "indefinite price changing

clauses" in new producer gas sales contracts are void under Sections 4, 5, and 7 of the Act.

Pan American duly filed applications for rehearing upon Orders Nos. 232 and 232-A. By Letter Order [fol. 92] issued May 4, 1961, the Commission rejected Pan American's application for rehearing upon Order No. 232, and by Letter Order issued May 5, 1961, it rejected Pan American's application for rehearing upon Order No. 232-A.

By Notice of Proposed Rulemaking issued October 10, 1961, in Docket No. R-203, the Commission gave notice of its proposal to issue an order to reject certificate applications supported by contracts containing "indefinite price changing clauses," and invited data, views, and comments upon such proposal. Pan American duly filed its data, views, and comments in Docket No. R-203. On February 8, 1962, the Commission issued its Order No. 242 in Docket No. R-203.

On March 7, 1962, Pan American filed its application for rehearing upon Order No. 242. By Order issued April 4, 1962, the Commission denied Pan American's application for rehearing. Thereupon, Pan American filed a Petition for Review in the Court of Appeals for the Tenth Circuit, in *Pan American Petroleum Corp.* v. *FPC*, Case No. 7002.

Under the date of October 4, 1962, Pan American and Colorado Interstate Gas Company (Colorado Interstate) entered into a contract for the sale of gas from Pan American's reserves in the Beaver Creek Field, Fremont County, Wyoming. On or about January 16, 1963, Pan American duly filed with the Commission under Section 7(c) of the Act an application for a certificate of public convenience and necessity covering such sale of gas.

Paragraph 5.1 of such contract provides that the price for the gas is 17.5¢ per Mcf through September 30, 1968, 18.5¢ per Mcf during the period October 1, 1968, through September 30, 1973, 19.5¢ per Mcf during the period October 1, 1973, through September 30, 1978, and 20.5¢ per Mcf during the period October 1, 1978, through September 30, 1983. This contract price changing provision

constitutes a so-called "definite price changing clause." Paragraph 5.1 of the contract further provides that, commencing October 1, 1983, the contract price for each five-year period shall be the fair market price determined and negotiated by the purchaser and seller at the beginning [fol. 93] of each such five-year period. This latter contract price changing provision constitutes a so-called "indefinite or flexible price changing clause." By Letter Order issued February 19, 1963, in Docket No. CI63-867, the Commission rejected and returned to Pan American, Pan American's certificate application. As its basis for such action, the commission stated that, because Pan American's October 4, 1962, contract contains a price changing provision which violates Order No. 232-A, Order No. 242 requires that the certificate application be rejected.

PAN AMERICAN IS AGGRIEVED

In its Motion to Dismiss in *Pan American Petroleum Corp.* v. *FPC*, Case No. 7002, Court of Appeals, Tenth Circuit, and in its briefs in support thereof, the Commission states that the issuance of letter orders, such as the February 19, 1963, Letter Order in Docket No. CI63-867, rejecting Pan American's certificate application, aggrieves Pan American so as to entitle it to review of Order No. 242.

STATEMENT IN SUPPORT OF APPLICATION FOR REHEARING

Section 9(a) of the Administrative Procedure Act, 5 U.S.C. § 1008 (a), provides that:

> "In the exercise of any power or authority—
>
> "(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

This statutory provision and the decisions of the Courts in *FPC* v. *Panhandle Eastern Pipe Line Co., et al.* 337 U.S. 498 (1949), and *Willmut Gas & Oil Co.* v. *FPC*, 294

F. 2d 245 (D. C. Cir. 1961), show that the power of the Commission to administer the Act and prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the scheme of rate regulation adopted by Congress in the Act. Regulation which does not do this but operates to create [fol. 94] a rule out of harmony with the Act or invades a subject over which the Commission is not delegated regulatory jurisdiction by the Act is void and a mere nullity. Order No. 242, as applied on February 19, 1963, to Pan American's October 4, 1962, contract is both inconsistent with the Act and arbitrary, capricious, and unreasonable. Section 16 of the Act clearly does not give the Commission authority to restrict or enlarge the scope of the Act or deprive Pan American of the free exercise of rights which are reserved to it free from regulation under Sections 4, 5 and 7 of the Act.

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), the Court held that regulation of natural gas company formulation of contract price changing clauses is not within the scope of the limited authority delegated to the Commission under the Act. This rule has been recognized and followed in numerous decisions of the United States Court of Appeals, among which are *Cities Service Gas Co.* v. *FPC*, 255 F. 2d 860 (10th Cir. 1958); *Phillips Petroleum Co.* v. *FPC*, 258 F. 2d 906 (10th Cir. 1958); and *Willmut Gas & Oil Co.* v. *FPC*, 294 F. 2d 245 (D. C. Cir. 1961).

Sections 4 and 5 of the Act provide that the Commission may not order contract rates disallowed unless, upon hearings and findings under such sections, the Commission finds such rates are unjust, unreasonable or unduly discriminatory. Section 7(e) of the Act provides that applications for certificates of public convenience and necessity shall be granted or denied by the Commission upon, and only upon, hearings and findings showing whether the proposed sale of gas is consistent with the present or future public convenience or necessity.

Order No. 242 and the February 19, 1963 application thereof to Pan American's contract constitute a substantive Section 4, 5 and 7 adjudication of whether Pan American may charge and collect its contract prices. However, such substantive adjudication is made summarily without hearings or findings as required by the Act and by Sections 5 and 7 of the Administrative Pro-
[fol. 95] cedure Act, 5 U.S.C. §§ 1004 and 1006, and by the Fifth Amendment to the Constitution of the United States.

Neither Order No. 242 nor the February 19, 1963 Letter Order are supported by facts or findings of fact showing that it is now necessary and proper to the administration of Sections 4, 5 or 7 of the Act that the price changing provisions of Pan American's contract which are operative after September 30, 1983, should now be eliminated. The Commission's conclusory statement that invalidation of flexible price changing clauses is now in the public interest and now necessary to making the task of regulation more manageable are not supported by findings of fact showing that the price changing provisions in Pan American's contract are "adverse to the public interest" and make the tasks of regulation not manageable. Furthermore, such conclusory statements are not standards governing substantive regulatory action under Sections 4, 5, or 7 of the Act. Section 16 of the Act does not prescribe substantive regulatory standards and does not itself authorize the taking of substantive regulatory action such as granting or denying certificates of public convenience and necessity or approving or disapproving increases in rates. Section 16 clearly does not authorize the Commission to emasculate Sections 4, 5, or 7 by making Sections 4, 5, or 7 substantive regulatory adjudications and decisions without satisfying the hearing requirements or regulatory standards prescribed therein.

The Commission's action is not supported by findings which even purport to rebut the finding in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), that flexible price changing clauses are necessary and proper or by findings which purport to

justify discriminating against Pan American by denying flexible forward pricing to Pan American while permitting forward flexible pricing to Colorado Interstate.

Order No. 242 and the February 19, 1963, Letter Order are clearly arbitrary, capricious and unreasonable. In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), the Court recognized that it is a business necessity that natural gas companies de- [fol. 96] termine the flexibility in rate making needed to enable them to file rates which they from time to time determine are needed to produce the income to maintain their financial integrity and gas reserves. The Commission's supposition that Pan American can predict for periods of 20 years or longer the revenue it will need to find and develop gas reserves sufficient to replace gas reserves that are currently being depleted is without foundation in fact and is unreasonable on its face. The Commission's supposition that rates which are below rates at issue in Section 4(e) rate hearings which involve other producers are sufficient to return to Pan American sufficient revenues to pay for replacing gas reserves as they are depleted is also unreasonable on its face. The mere fact that higher rates are currently at issue in rate adjudications shows that the lower rates may be confiscatory and such fact has no relationship to what rates are confiscatory with respect to specific sales by Pan American.

CONCLUSION

Order No. 242 and the February 19, 1963, Letter Order rejecting Pan American's certificate application are clearly unsupportable in law, fact or reason, and are, therefore, void as being in excess of the Commission's authority under the Natural Gas Act, the Administrative Procedure Act, and the Constitution of the United States.

WHEREFORE, Pan American respectfully requests that Order No. 242 and the February 19, 1963, Letter Order in Docket No. CI63-867 be vacated and set aside as being void and unlawful.

Respectfully submitted,

J. P. HAMMOND
WILLIAM H. EMERSON
P. O. Box 591
Tulsa 2, Oklahoma

[fol. 97]

THOMAS J. FILES
P. O. Box 40
Casper, Wyoming

WILLIAM J. GROVE
CARROLL L. GILLIAM
Dow Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.

By: /s/ Wm. H. Emerson
WM. H. EMERSON

Attorneys for Pan American Petroleum Corporation

Of Counsel:

Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D.C.

Dated at Tulsa, Oklahoma,
March 1, 1963

[fol. 98]

BEFORE THE FEDERAL POWER COMMISSION

Before Commissioners:

Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Pan American Petroleum Corporation

Docket No. CI63-867

ORDER DENYING APPLICATION FOR REHEARING—Issued March 6, 1963

On March 4, 1963, Pan American Petroleum Corporation (Pan American) filed an application for rehearing of the Commission's letter order of February 19, 1963, which rejected Pan American's January 16, 1963, application for a certificate of public convenience and necessity and the related filing of its October 4, 1962, gas purchase contract with Colorado Interstate Gas Company as the proposed rate schedule because the contract contains pricing provisions other than those permitted by Section 154.93, as amended, of the Commission's Regulations under the Natural Gas Act (Act). No request for waiver has been filed pursuant to Section 1.7 of the Rules of Practice and Procedure.[1]

For each five year period after October 1, 1983, the contract calls for "the establishment of the fair market price for the sale of gas hereunder * * *", by considering among other things prices in agreements "which at that time have been recently negotiated or renegotiated." It seems evident, therefore, that Paragraph 5.1 of the contract would permit a price redetermination based upon producer rates which are then in issue in suspension or certificate proceedings—a procedure clearly prohibited by

[1] Section 1.7 was amended and clarified by our Order No. 255 issued September 20, 1962.

Section 154.93. Pan American does not contend that Paragraph 5.1 comes within Section 154.93 and apparently did not draft it in order to meet the requirements of the Section. In essence Pan American attacks Section 154.93, as amended by Commission Orders Nos. 232, 232-A and 242 (Issued March 3 and 31, 1961, and Feb-
[fol. 99] ruary 8, 1962, respectively), as invalid because it is without reasonable basis in law and fact and goes beyond the powers granted to the Commission by the Act. However, Pan American presents no arguments that were not fully considered by the Commission when it issued the above mentioned orders.

The Commission finds:

The assignments of error and grounds for rehearing set forth in Pan American's application present no new facts or principles of law which were not considered by the Commission when it issued its letter order of February 19, 1963, or which having now been considered, warrant any change or modification of the order.

The Commission orders:

The application for rehearing filed by Pan American Petroleum Corporation on March 4, 1963, is hereby denied.

By the Commission.

/s/ J. H. Gutride
JOSEPH H. GUTRIDE,
Secretary.

[Clerk's Certificate omitted in printing]

[fol. 100]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 7303

[Title Omitted]

[File Endorsement Omitted]

JOINT MOTION BY PETITIONER AND RESPONDENT FOR ORDER OF CONSOLIDATION WITH CASE NO. 7002 AND PERMITTING OTHER PROCEDURES — Filed March 11, 1963

Petitioner and Respondent in the above-captioned case hereby respectfully move the Court to enter an order or orders (a) consolidating this Case No. 7303 for argument on March 18, 1963, with Case No. 7002; (b) permitting Petitioner and Respondent to submit this Case No. 7303 upon the Briefs heretofore filed by the parties in Case No. 7002 and upon the pleadings, including the Petition for Review, now on file in this Case No. 7303; and (c) permitting consideration and disposition of this Case No. 7303 by the Court simultaneously with its consideration and disposition of Case No. 7002 after the oral argument on March 18, 1963. In support of this Motion, Petitioner and Respondent show:

1. In Case No. 7002, Petitioner seeks review of Respondent's Order No. 242. That case has been fully briefed, and oral argument in that case is scheduled for March 18, 1963. However, in that case, Respondent has moved to dismiss on the grounds that Order No. 242 *per se* is not reviewable, but that the validity of the regulations promulgated by Order No. 242 can be reviewed only upon review of Respondent's subsequent action rejecting specific contract for filing.

2. In Case No. 7303, Petitioner now seeks review of action by Respondent so rejecting such a specific contract, and in this case, the Petition for Review includes as an appendix all of the pertinent documents from the record being certified to this Court by Respondent, including

[fol. 101] Respondent's Order issued March 6, 1963, denying rehearing below under Section 19(a) of the Natural Gas Act.

3. Respondent does not intend to move to dismiss Case No. 7303, and in Respondent's view, Case No. 7303 affords a proper vehicle for review of the regulations promulgated by Order No. 232-A and Order No. 242 by this Court. Accordingly, regardless of the Court's disposition of Case No. 7002 as to dismissal, Case No. 7303 will remain before the Court for disposition on the merits.

4. Petitioner and Respondent agree that their briefs in Case No. 7002 contain the pertinent arguments that they would make upon briefing in Case No. 7303, and that such briefs and the Petition for Review in Case No. 7303 thus afford the Court the arguments and presentations of orders, etc., which would be before the Court if additional briefs were filed in Case No. 7303, and a new record were printed therein.

5. Accordingly, Petitioner and Respondent wish to submit Case No. 7303 upon such pleadings therein, upon their respective briefs in Case No. 7002, and upon the oral argument now scheduled for March 18, 1963.

6. The parties believe that this procedure will be of substantial benefit to the parties and the Court in eliminating the substantial time and expense that will be required if Case No. 7303 is subsequently briefed and heard at a subsequent argument by the Court. Consolidation for argument will not require additional time for the argument now scheduled for March 18, 1963, and, in all respects, Petitioner and Respondent believe that thereafter the Case No. 7303 may be decided by the Court at the same time as Case No. 7002 is decided.

7. The filing of the Joint Motion and the averments herein are not intended by Petitioner or Respondent to be a change or waiver of their respective positions upon Respondent's Motion to Dismiss Case No. 7002.

WHEREFORE, Petitioner and Respondent respectfully move the Court to enter an order or orders

(a) consolidating Case No. 7303 with Case No. 7002 for oral argument now scheduled for March 18, 1963;

[fol. 102] (b) permitting Petitioner and Respondent to submit Case No. 7303 upon such oral argument, their respective briefs in Case No. 7002, and the Petition for Review and appendix thereto, already filed in Case No. 7303; and

(c) permitting the Court to consider and decide Case No. 7303 simultaneously with Case No. 7002.

Respectfully submitted,

/s/ Peter H. Schiff
441 G Street, N. W.
Washington 25, D. C.
For Respondent, Federal Power Commission

/s/ Carroll L. Gilliam
CARROLL L. GILLIAM
600 Munsey Building
Washington 4, D. C.
For Petitioner, Pan American Petroleum Corporation

Dated at Washington, D. C., this 8th day of March, 1963.

[fol. 103]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[File Endorsement Omitted]

MAY TERM, 1963

Nos. 6947, 7135, and 7217

TEXACO, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Nos. 6973, 7002, and 7303

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

[fol. 104]

No. 7179

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Alfred C. DeCrane, Jr., and James J. Flood, Jr. (P. F. Schlicher and P. R. Wimbish were with them on the briefs), for petitioner, Texaco, Inc., in Nos. 6947, 7135, and 7217.

William H. Emerson and Carroll L. Gilliam (J. P. Hammond, Thomas J. Files, Harold H. Young, Jr., and William J. Grove, and Dow, Lohnes, and Albertson, of counsel, were with them on the briefs) for petitioner, Pan American Petroleum Corporation, in Nos. 6973, 7002, and 7303.

John A. Ward. III (Phillip D. Endom, Joiner Cartwright, Herf M. Weinert, Charles F. Heidrick, J. Colbert Peurifoy, Robert E. May, Louis Flax, John T. Ketcham and May, Shannon and Morley, and Martin A. Row, of counsel, were with him on the brief), for petitioner, Sun Oil Company, in No. 7179.

Peter H. Schiff, Attorney (Richard A. Solomon, General Counsel, Howard E. Wahrenbrock, Solicitor, and Milton J. Grossman and Arthur H. Fribourg, Attorneys, Federal Power Commission, were with him on the briefs), for respondent, Federal Power Commission.

[fol. 105]

Before MURRAH, Chief Judge, and BREITENSTEIN and HILL, Circuit Judges.

BREITENSTEIN, Circuit Judge.

OPINION—May 20, 1963

These seven cases present another episode in the history of the regulation by the Federal Power Commission of independent producers of natural gas subject to its jurisdiction. Basically the issue is the right of the Commission to reject summarily and without a hearing a gas-purchase

contract between a producer and a pipeline company on the ground that the contract contains indefinite price-changing clauses forbidden by Commission regulations.

At the outset we are faced, in all but one of the cases, No. 7303, with the Commission's procedural objections to the right of the producers to maintain petitions for review in this court. The insistence of the parties on their procedural rights impels us to resist the temptation to go directly to the heart of the controversy.

[fol. 106] The struggles of the Commission to administer the Natural Gas Act so as to regulate producers have been described many times in Commission reports and decisions and in court decisions. We shall review the situation only to the extent necessary for a background to the phase of the problem with which we are concerned.

In United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 338, 341, the Supreme Court said that the Natural Gas Act [1] did not "abrogate private rate contracts as such" and construed §§ 4 and 5 of the Act [2] as parts of a statutory scheme under which "all rates are established initially by the natural gas companies." The gas is ordinarily sold in the field by a producer to a pipeline company which transports the gas to the area of use and there sells it to a retailer who makes distribution to the ultimate consumers. The pipelines must have a com-

[fol. 107] mitted source of gas supply sufficient to justify financing, construction, and operation. That supply is ordinarily obtained by long-term contracts of 20 years or more. The negotiation of a long-term contract presents problems of the continued fairness and adequacy of the original selling price.[3] These problems have given rise to price escalation provisions.[4] We have recognized

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[1] 15 U.S.C. § 717.

[2] 15 U.S.C. §§ 717c and 717d.

[3] Cf. United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103, 113.

[4] These provisions take many forms such as two-party favored-nation, three-party favored-nation, periodic escalation, redetermination, and spiral escalation. For the purposes of this decision an explanation of the differences is unnecessary except, as will later be discussed, in the differentiation between definite price-changing clauses and indefinite price-changing clauses.

contractual provisions for price escalation as unabrogated by the Act.[5]

[fol. 108] Within three months after the Mobile decision, the Commission gave notice in Docket No. R-153[6] of a proposed regulation to prohibit the filing of producers' contracts containing either pricing clauses tied to buyers' rates and pricing indices, or favored-nation clauses. This docket lay dormant until March 3, 1961, when the Commission issued its Order No. 232[7] declaring provisions for adjustment in price denoted as "indefinite escalation" clauses to be "inoperative and of no effect at law" in contracts tendered for filing after April 2, 1961. This order was superseded by Order No. 232-A[8] which added the following to the definition of "rate schedule" as contained in § 154.93 of the regulations:

[fol. 109] "*Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

"(1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

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[5] Cities Service Gas Producing Company v. Federal Power Commission, 10 Cir., 233 F.2d 726, 730, certiorari denied 352 U.S. 911 (adjustments based on "prevailing field price" in a specific area); Phillips Petroleum Company v. Federal Power Commission, 10 Cir., 258 F.2d 906, 918 (escalations tied to the "weighted average royalty rate" in a defined area); Kerr-McGee Oil Industries, Inc., v. Federal Power Commission, 10 Cir., 260 F.2d 602 (adjustments in ratio to pipeline company's resale rate); Warren Petroleum Corporation v. Federal Power Commission, 10 Cir., 282 F.2d 312 (adjustments under two-party favored-nation clause).

[6] 21 Fed. Reg. 2388, April 12, 1956.

[7] 25 F.P.C. 379, 26 Fed. Reg. 1983, March 8, 1961.

[8] 25 F.P.C. 609, 26 Fed. Reg. 2850, April 6, 1961.

"(2) provisions that change a price to a specific amount at a definite date; and

"(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question."

Hereafter we shall refer to contract provisions permissible under Order No. 232-A as definite price-changing clauses and to those impermissible under that order as indefinite price-changing clauses.

Pursuant to notice given on October 10, 1961, in Docket No. R-203,[9] the Commission, on February 8, 1962, issued [fol. 110] its Order No. 242[10] which made three amendments to the regulations. Section 154.93, defining producers' rate schedules, was amended to prescribe automatic rejection of contracts containing indefinite price-changing clauses. The amendment reads:

"*Provided further*, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above [Order No. 232-A] shall be rejected."

Order No. 242 also amended §§ 157.14 and 157.25 of the regulations so as to prohibit the consideration of contracts containing the forbidden clauses in support of a pipeline's application for a certificate of convenience and necessity.

The cases now before us attack the validity of Orders Nos. 232, 232-A, and 242. With this background we turn to the procedural questions.

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[9] 26 Fed. Reg. 9732, October 14, 1961.

[10] 27 F.P.C. 339, 27 Fed. Reg. 1356, February 14, 1962. Rehearings denied 27 F.P.C. 666.

[fol. 111] Court review of Commission orders is governed by § 19(b) of the Act,[11] which provides that a party to a proceeding "aggrieved" by a Commission order may obtain a review in the court of appeals "for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business," or in the Court of Appeals for the District of Columbia Circuit. The Commission asserts that venue does not lie in the Tenth Circuit for consideration of the three petitions of Texaco, Inc., Nos. 6947, 7135, and 7217, because the petitioner is not located in, and does not have its principal place of business in, that circuit. Texaco is incorporated under Delaware law and allegedly has its principal place of business in Texas. Venue in the Tenth Circuit depends on the meaning to be given the word "located."

Texaco's petitions for review allege that its Tulsa Division has responsibility for Texaco's producing activities and operations in an area including Oklahoma and Kan- [fol. 112] sas.[12] The Tulsa Division operations include "the negotiation of leases and exploration permits; geological and geophysical activities; the drilling of exploratory wells, and the development of productive areas; the payment of royalties and production taxes; the filing of state reports and the disposition of the production." In each case personnel of the Tulsa Division negotiated the contracts with the pipelines. That division supervises the performance of the contracts by Texaco, maintains records pertaining thereto, and receives payment for the gas sold. The certificate applications were made by the Tulsa Division.

The Commission asserts that the word "located" as used in § 19(b) means the same as "resides" and refers to the state of incorporation. Oddly enough, the extensive litigation over the Natural Gas Act has not produced an an- [fol. 113] swer to this simple question. Perhaps the reason

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[11] 15 U.S.C. § 717r(b).

[12] Another of Texaco's seven producing department divisions is headquartered in Denver, Colorado, and has similar responsibilities for an area including Colorado, New Mexico, Utah, and Wyoming, all states of the Tenth Circuit.

is that the point concerns venue rather than jurisidiction.[13] The Commission asserts a "long-established understanding" of the Commission and the natural-gas companies that "located" refers to the state of incorporation, and cites an impressive list of cases brought in the Third Circuit on the basis of the incorporation of the natural-gas companies, which were parties thereto, in one of the states of the Third Circuit. Texaco counters with an equally impressive list of cases wherein review was had in a circuit in which the natural-gas company was not incorporated and did not have its principal place of business. As venue may be waived, we are not impressed with this approach.

In a long line of decisions, beginning with Shaw v. Quincy Mining Company, 145 U.S. 444, 450, the Supreme Court has held that the residence of a corporation within the meaning of venue statutes is only the state of incorporation. In Suttle, Administratrix, v. Reich Bros. Construction Co., 333 U.S. 163, 166-167, the Supreme Court [fol. 114] reviewed these cases and said that Congress has revealed a similar understanding in the enactment of special venue statutes. The presumption is that Congress was aware of the applicable decisions, and its recognition of them, when it enacted the Natural Gas Act.[14]

The parties agree that the pertinent language of § 19 (b) was taken from § 313(b) of the Federal Power Act.[15] The legislative history of that section shows that "is located" was substituted for "resides."[16] The Commission

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[13] Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U.S. 635, 638.

[14] Shapiro v. United States, 335 U.S. 1, 16. Cf. Public Service Company of New Mexico v. General Electric Company, 10 Cir., —— F.2d ——, decided March 15, 1963; United States v. Sanders, 10 Cir., 145 F.2d 458, 461.

[15] 16 U.S.C. § 825l(b).

[16] The first version of what ultimately developed as § 313(b) of the Federal Power Act (Part III of the Public Utilities Holding Act of 1935, Part III, Act of August 26, 1935, c. 687, § 313(b), 49 Stat. 803, 854, 860, appeared in S. 1725, 74th Cong., 1st Sess. In its briefs the Commission says that this bill provided that a person aggrieved could obtain review of a Commission order in a court of appeals "for any circuit wherein such person resides or has his principal place of business," and that a revised bill,

[fol. 115] says that there is no explanation of the purpose of the change. In our opinion the change is significant and the deliberate substitution of words shows a congressional intent not to narrow the provision to the state of incorporation. If Congress had so intended, it would have retained the word "resides."

The Commission urges that, unless "is located" is equated with "resides," the insertion of the phrase "principal place of business" is but an exercise in redundancy violative of the rule that all terms of a statute must be given effect. We do not agree. Congress is presumed "to have used language in accordance with the common understanding." [17] "Located" means having physical presence or existence in a place.[18] A corporation has physical pres-
[fol. 116] ence or existence in the state of incorporation and in a state where it conducts substantial operations. Granting that a corporation is located in the state in which it has its principal place of business, the overlap in provisions must be for the purpose of clarity. The fact of the overlap does not detract from the effect of the substitution of "is located" for "resides." We deem the change in phraseology to be more significant than the overlap.

This conclusion does not intend that the mere legal indicia of "doing business" will support venue under § 19 (b). In Colorado Interstate Gas Co. v. Federal Power Commission, 10 Cir., 142 F.2d 943, 950-951,[19] we denied

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S. 2796, contained the venue provisions now found in § 313(b). The significant modifications are that the reference point for venue is the licensee or public utility rather than the petitioner, and that the words "is located" replace "resides."

[17] United States v. Wurts, 303 U.S. 414, 417.

[18] Webster's New International Dictionary, 2d ed. (1959), Unabridged, defines "locate" as: "1. To designate the site or place of; * * *. 2. a. To set or establish in a particular spot or position; to station. b. To establish in a charge or office. * * *." The word "location" is defined as: "1. Act or process of locating (in various senses); fact or condition of being located, or of having position. * * *."

[19] Affirmed, Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581; affirmed in part, reversed in part on other grounds, Colorado-Wyoming Gas Co. v. Federal Power Commission, 324 U.S. 626.

a motion to dismiss and held that the petitioners in that [fol. 117] case had their principal places of business in Colorado, saying that the question was one "of fact to be determined in each particular case." The same principle applies here and the question of whether Texaco is located in the Tenth Circuit must be determined on the particular facts. The undenied allegations of Texaco are that it conducts extensive operations in the Tenth Circuit and has two of its seven production divisions therein. More importantly, in each of the cases the gas sold is produced in the Tenth Circuit and the performance of the contract occurs in the Tenth Circuit. As all matters concerned with the applications of Texaco which resulted in the orders here sought to be reviewed took place in the Tenth Circuit, Texaco is located in that circuit for the purpose of the venue provisions of § 19(b).

The Commission has moved to dismiss cases Nos. 6947, 6973, 7002, 7135, and 7179 upon the ground that in each case the petitioner is not "aggrieved" within the requirement of § 19(b). The facts in these cases divide them [fol. 118] into two groups which must be considered separately.

In the first group are cases Nos. 7002 and 7179.[20] Each of these seeks to review and set aside Order No. 242. That order was issued as a rule of general applicability and amended certain sections of the regulations.

In moving to dismiss these cases the Commission asserts that the Act vests no jurisdiction in the courts of appeals to review orders of the Commission amending its general rules and regulations. The petitioners counter by saying that reviewability is predicated on an invasion of legal rights and that such rights of the petitioners are directly affected by Order No. 242.

The Tenth Circuit is committed to the view that § 10 of the Administrative Procedures Act[21] is inapplicable to the

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[20] No. 7179—Sun Oil Company v. Federal Power Commission—was originally filed in the Court of Appeals for the District of Columbia Circuit and was transferred to the Tenth Circuit pursuant to the provisions of 28 U.S.C. § 2112 because of the earlier petition filed in the Tenth Circuit by Pan American in No. 7002.

[21] 5 U.S.C. § 1009.

review of Commission orders under the Natural Gas [fol. 119] Act.[22] Accordingly, the right of review is governed entirely by § 19(b) of the Natural Gas Act. That section permits review on the petition of a party aggrieved. The query is when, and in what circumstances, is a party aggrieved.

Sales of gas by producers to pipelines are initiated by private contract and those contracts are subject to review by the Commission under statutory standards. No right exists in the seller to change a rate fixed by contract unless the contract itself recognizes a right to change the rate. An order of the Commission proscribing price-changing provisions is an interference with the right to contract and a denial of a substantive right. Without considering for the moment the question of the power of the Commission to interfere with such a substantive right, those to whom the right is denied are entitled to court review of such action to test whether the action is within the statu- [fol. 120] tory powers of the Commission. The problem is how this review may be had under § 19(b).

An easy and quick method of reviewing orders which affect substantive rights and which are of general applicability would aid the administration of the Act. The difficulty is that the Commission has construed § 19(b) so as to preclude any such expeditious review and the position of the Commission has been quite uniformly upheld by the courts.

In seeking reviews of orders of general applicability the petitioners rely on the decisions in Columbia Broadcasting System, Inc., v. United States, 316 U.S. 407, and United States v. Storer Broadcasting Co., 351 U.S. 192, in which rules of general applicability affecting substantial rights were held reviewable under other statutes. The courts of appeals have not applied these decisions in determining rights to review under § 19(b). Without going into the distinctions and differences which have been stated, the controlling point has been that a person is not aggrieved by a general order and cannot complain until a [fol. 121] personal right is impinged by a special order.

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[22] Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 231 F.2d 461, 465.

The Tenth Circuit, in Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 231 F.2d 461, declined to review order issuing rules after the decision in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672. In so holding it relied heavily on United Gas Pipe Line Co. v. Federal Power Commission, D.C.Cir., 181 F.2d 796, certiorari denied 340 U.S. 827, and that court's treatment of the Columbia Broadcasting case. More recently, the Fifth Circuit has sustained Commission motions to dismiss petitions seeking to review Order No. 232-A [23] and to review Order No. 242.[24] We accept these decisions as correct applications of § 19(b). Certainly the language of the statute is strained if review may be had of a negative or- [fol. 122] der of general applicability by a party who has not been, and may never be, affected by the order except in a theoretical manner. Accordingly, Nos. 7002 and 7179 must be dismissed on the ground that the petitioners are not aggrieved within the meaning of § 19(b).

The second group of cases attacks special orders made under the authority of the mentioned general orders. In each instance the questioned decisions have granted the authority sought but provide that any application for a rate change under an impermissible price-changing clause will be rejected.

Nos. 6947, 6973, and 7135, concern applications for certificates of convenience and necessity covering gas sales by producers to pipelines. In Nos. 6947 and 7135 the same contract is presented, one for the sale by Texaco to Lone Star Gas Company of gas produced in the Carter-Knox Field, Stephens County, Oklahoma. In No. 6973 the sale is by Pan American to Mountain Fuel Supply Company of gas from the Middle Mountain Unit Area, Sweetwater County, Wyoming. Each contract was made or amended after the effective date of Order No. 232-A and

[23] Sun Oil Company v. Federal Power Commission, 5 Cir., 304 F.2d 293, certiorari denied 371 U.S. 861.

[24] Hunt Oil Company v. Federal Power Commission, 5 Cir., 306 F.2d 878. The Third Circuit took similar action in an unreported case, Shell Oil Company v. Federal Power Commission, case No. 14058, decided July 17, 1962.

[fol. 123] contains indefinite price-changing clauses. The Commission granted temporary authorizations in Nos. 6947 and 6973. A permanent certificate was granted in No. 7135 for the same service as that presented in No. 6947.

In each of the three cases the order of the Commission contains this provision in substantially identical language:

> "Further, in the event that any of the documents comprising the listed rate schedules and supplements was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected."

The petitions for review in these cases are directed against the quoted provision of the respective orders. The Commission has moved to dismiss each on the ground that the petitioner is not a party aggrieved.

On the one hand the petitioners say that Order No. 232-A, as implemented by the orders containing the provision in question, has effectively nullified indefinite price-chang-[fol. 124] ing clauses and thus deprived petitioners of contract rights assured to them by the Act and by the Mobile decision. On the other hand the Commission urges that the orders sought to be reviewed in these cases do not themselves adversely affect the petitioners but only affect their rights adversely on the contingency of future administrative action.

In Sunray Mid-Continent Oil Company v. Federal Power Commission, 10 Cir., 270 F.2d 404, 407, the Tenth Circuit dismissed, on Commission motion, a petition to review a Commission order authorizing temporary service and providing that service once instituted could not be discontinued without Commission permission. Objection was made to the provision for termination of service. The dismissal was on the ground that the petitioner had not

sought to terminate and, hence, was not aggrieved.[25] In Sun Oil Company v. Federal Power Commission, 5 Cir., [fol. 125] 304 F.2d 290, certiorari denied 371 U.S. 861, the Fifth Circuit was confronted with a situation comparable to the one here presented. Objection was made to the inclusion in an authorization for temporary service of a provision, similar to that appearing in Nos. 6947, 6973, and 7135, for the rejection of rate increases covered by impermissible price-changing clauses. The court sustained the Commission motion to dismiss saying that the clause attacked was interlocutory and not reviewable.

We conclude that the provisions of the orders attacked in Nos. 6947, 6973, and 7135 do not adversely affect any right of the petitioners and, hence, the petitioners are not aggrieved within the requirement of § 19(b). That conclusion does not mean that Orders Nos. 232, 232-A, and 242 are valid or that contracts executed after the effective date of those orders are "inoperative" or "of no effect at law" when they contain indefinite price-changing clauses.

This brings us to No. 7303, in which the Commission has interposed no procedural objections to the petition for [fol. 126] review, and to No. 7217 in which we hold that the motion to dismiss must be denied. In each of these the Commission rejected an application for a certificate of convenience and necessity on the ground that the underlying contract contained pricing provisions not permissible under § 154.93, as amended by Order No. 232-A.[26] The rejection was based on Order No. 242. As we have heretofore stated, that order provides for the rejection of ap-

[25] The court, quoting from Rochester Telephone Corp. v. Uni ed States, 307 U.S. 125, 130, said: " * * * the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action."

[26] No. 7217 relates to an application by Texaco for a certificate covering a sale by it to Natural Gas Pipeline Company of America of gas produced in the Camrick Southeast Field, Beaver County, Oklahoma. The application in No. 7303 is based on a contract for the sale by Pan American to Colorado Interstate Gas Company of gas produced in the Beaver Creek Field, Fremont County, Wyoming. Each contract contains indefinite price-changing clauses.

plications for certificates when the underlying contract contains price-changing clauses forbidden by Order No. 232-A.

Our difficulty is immediately apparent. The summary rejection of the Texaco and Pan American contracts without a hearing deprives the court of any record upon which the rejection may be sustained, other than the general or- [fol. 127] ders which are attacked. As we have noted above, the Commission has successfully maintained that these general orders are not subject to direct court review. This bootstrap operation of the Commission, in practical effect, circumvents court review of the basic question—the propriety of indefinite price-changing clauses.

Neither sympathy for the administrative difficulties of the Commission nor recognition of its expertise in the regulation of those subject to the Natural Gas Act justifies disregard of the statutes under which the Commission operates. We find no statutory authorization for the Commission actions here attacked.

Section 16 of the Act[27] empowers the Commission to make rules and regulations to carry out the provisions of the Act but that section is not a source of power to regulate in conflict with substantive provisions of the Act.[28] [fol. 128] The Commission asserts that the necessary authority flows from §§ 4, 5, and 7.[29]

Sections 4 and 5 relate to rates and charges and give the Commission power to modify contracts—not to make contracts. The power to modify can be exercised only after hearing. The controlling standard is what is just and reasonable.[30]

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[27] 15 U.S.C. § 717o.

[28] Cf. Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 508. See also Willmut Gas & Oil Company v. Federal Power Commission, D.C. Cir., 294 F.2d 245, 250, certiorari denied 368 U.S. 975, saying that § 16 does not permit the Commission to promulgate rules inconsistent with the Act and thus result in a legislative change.

[29] 15 U.S.C. §§ 717c, 717d, and 717f.

[30] Section 4, subparagraph (a), provides that all rates and charges must be just and reasonable. Subparagraph (c) requires the filing of schedules showing all rates and charges "together

[fol. 129] Section 7(c) provides that no natural-gas company "shall engage in the transportation or sale of natural gas" without a certificate of public convenience and necessity and with immaterial exceptions requires the Commission to set "for hearing" applications to obtain such certificates. Section 7(e) states that the certificate will issue if the Commission finds that the proposed service "is or will be required by the present or future public convenience and necessity."

The Commission held no hearings relative to the promulgation of Orders Nos. 232, 232-A, or 242. Nevertheless, [fol. 130] the Commission made findings allegedly justifying such orders.[31] In summary the Commission found that indefinite price-changing clauses are "undesirable, unnecessary and incompatible with the public interest;"[32] that such contract provisions "have resulted in a flood of almost simultaneous filings" which "bear no apparent relationship to the economic requirements of the producers

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with all contracts which in any manner affect or relate to such rates, charges, * * * ." Subparagraph (d) forbids a change in a rate or charge without 30-days' notice to the Commission. Subparagraph (e) provides that when a new rate schedule is filed, the Commission, either on complaint or on its own initiative, but on reasonable notice may "enter upon a hearing concerning the lawfulness" thereof; that the Commission may suspend a new schedule for five months; that "after full hearings, * * * the Commission may make such orders with reference thereto as would be proper" in a § 5 proceeding; and that if the proceedings have not been concluded and an order entered at the end of the suspension period, the proposed change shall go into effect but the Commission may require a bond for refund of overpayments.

So far as material, § 5 provides that when the Commission, "after a hearing," on its own motion or on complaint, finds that a "rate, charge, or classification" or "any rule, regulation, practice, or contract" having an effect thereon, is "unjust, unreasonable, unduly discriminatory, or preferential," the Commission shall determine and fix by order "the just and reasonable rate, charge, classification, rule, regulation, practice, or contract."

[31] These findings are reported for Order No. 232, at 25 F.P.C. 380, 26 Fed. Reg. 1983; for Order No. 232-A at 25 F.P.C. 609, 26 Fed. Reg. 2850; and for Order No. 242 at 27 F.P.C. 339-340, 27 Fed. Reg. 1356.

[32] 25 F.P.C. 380, 26 Fed. Reg. 1983.

who file them;" and that such filings "have created a significant portion of the administrative burdens under which this Commission is laboring today." [33]

These findings are not made in the language of the statutory standards of "just and reasonable" and "public convenience and necessity." The public interest must be related to and tested by these standards. Although the Commission is the guardian of the public interest in the [fol. 131] administration of the Act, the Commission may not substitute its standards for the statutory standards. Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them.[34] In the cases at bar the Commission has held no adversary hearings at which facts have been adduced to sustain findings which, on the basis of statutory standards, support the decisions reached. No amount of administrative expertise can supply these deficiencies.

The Commission vigorously asserts the validity of Orders Nos. 232, 232-A, and 242 as orders of general appli- [fol. 132] cation within Commission power which are desirable and preferable to a case-by-case approach to the regulatory problems. At the same time the Commission with equal vigor says that the orders are reviewable only on a case-by-case basis after rejection of a particular contract containing clauses impermissible under the general orders. Such a divided approach to a basic and difficult problem cannot throw a cloak of conclusive validity over general orders. If the general orders are not themselves reviewable and if special orders based thereon are not reviewable when the result falls short of the denial of

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[33] 27 F.P.C. 340, 27 Fed. Reg. 1357.

[34] The Commission's reliance on its decision in the case of The Pure Oil Company, 25 F.P.C. 383, is not helpful. The Commission there held that indefinite escalation provisions are, in general, contrary to the public interest. The Commission order was affirmed on review, Pure Oil Company v. Federal Power Commission, 7 Cir., 299 F.2d 370, but the court did not discuss the problems with which we are concerned. In any event a record made in that proceeding is not dispositive of the issues now under consideration.

a presently asserted substantive right, then those general orders are only of an advisory nature and neither forbid the inclusion in contracts of indefinite price-changing clauses nor justify the rejection, on the sole ground of violation of general regulations, of contracts containing such clauses.

The Commission argues that in making the challenged orders it was "legislating interstitially, as contemplated by the Act." Although the "filling in the interstices of [fol. 133] the Act" may be performed through a "quasi-legislative promulgation of rules,"[35] administrative officers must keep within the bounds of their administrative powers,[36] which are limited by the scope of the statute.[37] In Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617-618, the Supreme Court said:

> "* * * not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. * * * For the ultimate question is what has Congress commanded * * *."

Under the Natural Gas Act and the Mobile decision, rates and charges for the sale of gas are initially prescribed by private contract and may be increased only in accordance with contract provisions. Contracts es- [fol. 134] tablishing such rates and charges and providing for changes therein may be modified by the Commission only after hearing and then only by the application of the standards of "just and reasonable" and "public convenience and necessity." The summary rejection of applications based on contracts containing price-changing clauses, of which the Commission does not approve, deprives

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[35] Securities & Exchange Commission v. Chenery Corporation, 332 U.S. 194, 202.

[36] American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 236.

[37] Federal Communications Commission v. American Broadcasting Co., Inc., 347 U.S. 284, 290.

the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review.

Perhaps in some regards the Commission may "legislate interstitially" but in our opinion it may not do so when its action results in the denial of substantive rights. The horrendous consequences of such actions are well described in Hunt v. Federal Power Commission, 6 Cir., 306 F.2d 334, 342-345, and need not be repeated here. Within its constitutional powers Congress may legislate on substantive rights without hearings and findings. The Commission has attempted to usurp that congressional power No claim of administrative need or of frustra-[fol. 135] tion in the performance of its duties can make up for the lack of statutory authority.

We are deciding only the cases before us. The problems of area pricing are not presented here. In our opinion Order No. 242 is void and without effect. Orders Nos. 232 and 232-A are in a different category. As advisory declarations of Commission policy they determine no rights. At the same time those orders do not, and cannot, invalidate either retroactively or prospectively price-changing clauses in a gas-sale contract between a producer and a pipeline and are no justification for the rejection, without hearing, of a rate or charge based on such clauses.

For the reasons stated the motions to dismiss Nos. 6947, 6973, 7002, 7135, and 7179 are sustained and those cases are dismissed. The motion to dismiss No. 7217 is denied. The orders of the Commission in Nos. 7217 and 7303 are set aside and held for naught and the cases are remanded for further consideration in accordance with the views expressed in this opinion.

[fol. 136]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JUDGMENT—May 20, 1963

* * * *

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

These causes came on to be heard and were argued by counsel.

On consideration whereof, for the reasons stated in the opinion of this court, the motions to dismiss cases Nos. 6947, 6973, 7002, 7135 and 7179 are sustained and these cases are dismissed out of this court.

The motion to dismiss case No. 7217 is denied.

The orders of the Commission in Nos. 7217 and 7303 are set aside and held for naught and the cases are remanded for further consideration in accordance with the views expressed in the opinion of the court.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MINUTE ENTRY OF ORDERS STAYING MANDATE

By orders of June 24, 1963, and July 22, 1963, the mandate of the United States Court of Appeals was stayed to and including August 21, 1963, under provision of paragraph 3 of rule 28 of said court.

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* * * *

[fol. 137]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 138]

SUPREME COURT OF THE UNITED STATES

No. 386, October Term, 1963

FEDERAL POWER COMMISSION, PETITIONER

vs.

TEXACO., ET AL.

ORDER ALLOWING CERTIORARI—November 12, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 716499 559

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OCTOBER TERM, 1963

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit, entered on May 20, 1963.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 21–44) is reported at 317 F. 2d 796.

JURISDICTION

The judgments of the court of appeals setting aside the Commission's orders and remanding the proceedings were entered on May 20, 1963 (App. B, *infra*, p. 42). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

The Federal Power Commission summarily rejected applications for certificates of public convenience and necessity filed by respondent gas producers because they were based upon contracts containing price-changing provisions of a kind which the Commission had proscribed by regulation as contrary to the public interest.

The question presented is whether the Commission may proceed by way of the rule-making power to prohibit contractual arrangements (including spiral escalation clauses, favored-nations provisions and other types of indefinite pricing) which it finds incompatible with the public interest or whether, as held by the court of appeals, it may establish and implement its policies in this area only by case-by-case adjudication.[1]

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001–1011, the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717–717w, and of the Commission's regulations, as amended, 18 C.F.R. (Cum. Supp. 1963), are set out in Appendix C, *infra*, pp. 43–54.

STATEMENT

The challenged regulations.—The decision below invalidates regulations of the Commission prohibiting certain price-changing provisions—such as "favored-nation," unlimited price-redetermination, and "spiral

[1] If certiorari is granted, the Commission also reserves the right to argue that the court below erred in not dismissing Texaco's petition for review for lack of proper venue under Section 19(b) of the Natural Gas Act.

escalation" clauses—in independent producer contracts. Thus, the court has set aside two orders of the Commission rejecting out-of-hand producer applications based on contractual provisions concededly forbidden by the agency's regulations.

The Commission's Regulations under the Natural Gas Act, Section 154.91 *et seq.*, as amended (18 C.F.R. (Cum. Supp. 1963) 154.91 *et seq.*), provide that independent producers subject to the agency's jurisdiction shall file their contracts as rate schedules. Section 154.93 provides in part:

> * * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:
>
> (a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
>
> (b) Provisions that change a price to a specific amount at a definite date; and
>
> (c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question * * *.

This language was added by Order No. 232, issued March 3, 1961 (T.R.[2] 11–16, 25 FPC 379, 26 Fed. Reg. 1983), as amended by Order No. 232A, issued March 31, 1961 (T.R. 17–19, 25 FPC 609, 26 Fed. Reg. 2850).

Section 154.93 of the regulations further provides that "any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions" described above "shall be rejected." Similarly, Section 157.25 provides that an independent producer application for a certificate of public convenience and necessity "shall be rejected" if any contract submitted in support of it contains the forbidden provisions; and Section 157.14(a)(10)(v) provides that any producer contract executed after April 2, 1962, which has this infirmity, "will be given no consideration in determining adequacy" of a pipeline company's gas-supply showing in support of a certificate application. These provisions were added to the regulations by Order No. 242, issued February 8, 1962 (T.R. 20–23, 27 FPC 339, 27 Fed. Reg. 1356).

Procedural history of the regulations.—Orders No. 232 and 232A, which amended Section 154.93 by limiting the types of price-changing provisions that would be permissible in producer contracts executed after the effective date of those orders, were issued in a rule-making proceeding initiated by a notice of proposed rule-making published in the Federal Register on April 12, 1956 (21 Fed. Reg. 2388) and the

[2] "T.R. ——" refers to the pages of the printed transcript of record below in the *Texaco* case, C.A. 10, No. 7217.

mailing of notices to interested parties including state and regulatory agencies (T.R. 11, 25 FPC at 380). In its notice (21 Fed. Reg. 2388), the Commission announced that it proposed to amend its regulations governing independent producers by designating certain types of contracts for the sale of natural gas which would not be accepted for filing as rate schedules. Specifically, it proposed to reject contracts containing provisions calling for price adjustments keyed to "(a) escalator clauses based on price indices or changes in the price received by the purchaser upon resale, or (b) the payment or offer of payment of higher prices by the purchaser or other purchasers in the same or other producing areas to the same or other sellers" (21 Fed. Reg. 2389).

The notice invited comments on or before June 1, 1956 (21 Fed. Reg. 2389). Numerous responses, including comments from Texaco and Pan American,[3] were received by the Commission, both in support of and in opposition to the proposed rule. Later, in *Pure Oil Co.*, 25 FPC 383, affirmed, 299 F. 2d 370 (C.A. 7), the Commission had the benefit of extensive hearings, briefs and oral arguments on the issue of whether or not favored-nation clauses are contrary to public policy.[4]

[3] At the time of making these comments, the names of the companies were The Texas Company and Standard Oil and Gas Company, respectively.

[4] While that case was decided on the ground that the favored-nation clause had not been triggered, the Commission, as stated in Order No. 232, explained there why it regarded indefinite escalation clauses to be contrary to the public interest. *Pure Oil Co.*, 25 FPC 383, 387–391.

The upshot of the rule-making proceeding was the issuance of Order No. 232 (T.R. 11–16, 25 FPC 379), on March 3, 1961. In that order, the Commission found that long-term gas supply contracts containing "indefinite escalation clauses" (which it defined as all price escalation provisions other than those calling for increases of specific amounts at definite dates or those intended to reimburse the seller for all or any part of changes in production, severance or gathering taxes levied on the seller) "have contributed to instability and uncertainty concerning prices of gas and service expansion by natural gas companies," and that such clauses are contrary to the public interest, as found in *Pure Oil Co.*, 25 FPC 383. Accordingly, it amended the regulations to prohibit the use of indefinite escalation provisions in new producer contracts. This was accomplished by adding definitions of "definite" and "indefinite" escalation clauses to Section 154.91 of the regulations and by adding a proviso to Section 154.93 declaring that any provision for a change of price based on an indefinite escalation clause in a contract filed on or after April 3, 1961, would be "inoperative and of no effect at law" (T.R. 12–13, 25 FPC at 381). Order 232 also provided that the amendments to the regulations there promulgated would become effective April 3, 1961, and specified that any interested person could submit written views or comments to the Commission by March 20, 1961. T.R. 13, 25 FPC at 381.

On March 31, 1961, the Commission, upon consideration of further comments filed by interested persons, including Texaco and Pan American, issued

Order 232A modifying Order 232. In this order, the Commission found that it "appears that elimination of all indefinite escalation provisions would be too restrictive to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts. Therefore, to permit pricing flexibility and to provide an incentive for long-term contracts, we should permit future contracts to contain limited price-redetermination provisions, invocable not more than once in every five-year contract period and based upon rates subject to this Commission's jurisdiction (and therefore, controlled)" (T.R. 17–18). It also concluded that the amendment to the regulations should apply only to contracts "executed" on or after April 3, 1961 (under Order 232 the amendment would have applied to contracts "filed" on or after that date, whenever executed).[5]

Order 242, which spelled out the procedures to be used in effectuating the amended provisions of Section 154.93 of the regulations promulgated by Order 232A, was also issued as a rule of general applicability. It, too, was initiated by a notice of proposed rulemaking (26 Fed. Reg. 9732), and by the mailing of notices to interested persons, including natural gas companies and state and federal agencies (T.R. 20, 27 FPC 339). In that notice, the Commission stated (26 Fed. Reg. 9732, 9733):

[5] Sun Oil Company's petition to review Order Nos. 232 and 232A was dismissed for lack of jurisdiction. *Sun Oil Co.* v. *Federal Power Commission*, 304 F. 2d 293 (C.A. 5), certiorari denied, 371 U.S. 861.

> Having found in Order No. 232A that indefinite escalation provisions" * * * are generally undesirable, unnecessary and incompatible with the public interest for the due and proper development of natural gas service by natural gas companies * * *", it appears that no useful purpose can be served by the Commission's acceptance of contracts containing indefinite price escalation provisions or of applications relying upon contracts having such provisions as proof of the applicants' gas supply.[6]

Following receipt of numerous responses (T.R. 20, 27 FPC 339), again including comments from Texaco and Pan American, the Commission on February 8, 1962, adopted an order amending the rules to conform with the present language. The Commission again explained the basis for the existing regulations, the validity of which had been challenged in many of the comments. It stated, *inter alia,* that it could not acquiesce in indefinite price-changing provisions because they hampered effective rate regulation, and that the existing regulation and the amendments thereto were necessary to remove a serious impediment to the performance of the Commission's statutory duties.[7]

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[6] The specific amendments proposed were substantially the same as those eventually adopted in Order 242, except that the proposed regulations would have rejected rate schedules or certificate applications *filed* after the specified date, rather than only those *executed* after the specified date as provided by Order 242.

[7] A number of producers filed applications for rehearing of Order 242. After these were denied on April 4, 1962 (27 FPC

The present cases.—On the basis of these regulations, the Commission rejected applications of Texaco and Pan American for certificates of public convenience and necessity on the ground that they depended upon contracts containing impermissible price-changing provisions (T.R. 62, P.[3] Pet. for Rev. p. 9a). In their applications for rehearing, Texaco and Pan American complained, in essence, that the summary rejections were invalid because of the alleged invalidity of the regulations on which they were based. Neither company requested a waiver of the regulations, as they were permitted to do by Section 1.7(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. (Cum. Supp. 1963) 1.7(b).

The court below set aside the Commission's orders, holding (App. A, *infra*, p. 40) that the "summary rejection of applications based on contracts containing

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666), six petitions for review of that order were filed. Each of these has now been dismissed on motions of the Commission.

The Fifth Circuit dismissed the petitions of Hunt Oil Company, Humble Oil & Refining Company, and the Superior Oil Company (*Hunt Oil Co.* v. *Federal Power Commission*, 306 F. 2d 878) and the Third Circuit dismissed *Shell Oil Co.* v. *Federal Power Commission*, C.A. 3, No. 14058, decided July 17, 1962 (unreported). The opinion of the Tenth Circuit in this case dismissed the petitions of Pan American in C.A. 10, No. 7002, and Sun Oil Company in C.A. 10, No. 7179. App. A, *infra*, pp. 30–32.

[3] Pan American's petition for review in the case below contained all material normally included in a joint appendix or printed record. This procedure was agreed upon by the Commission below to permit the case to be consolidated for hearing with the six other petitions for review, relating to the validity of these regulations, then pending in the court below.

price-changing clauses, of which the Commission does not approve, deprives the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review."*

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question as to the scope of the Commission's rule-making powers under Section 16 of the Natural Gas Act. That section vests the Commission with broad authority to issue such rules of general applicability "as it may find necessary or appropriate to carry out the provisions" of the Act. Under Sections 4 and 5 of the Act, the Commission is empowered to require the modification of contractual provisions which it finds to be unjust and unreasonable, and under Section 7 it may condition the issuance of an initial certificate upon the removal of contract provisions found incompatible with the public convenience and necessity. To carry out these Sections and to particularize the statutory standards, the Commission adopted regulations prohibiting, for the future, various contractual arrangements which it concluded, both on the basis of long experience and extensive rule-making proceedings, were inimical to the public interest.

Without reaching the substantive question of the reasonableness of these particular regulations, the court below has held that the Commission has no power to

* In addition to the two cases here involved, Commission orders rejecting certificate applications based on contracts con-

adopt a rule of general application which would enable it to reject at the threshold a certificate application based upon a contract containing one of the forbidden provisions.

We believe that the court of appeals' decision is in direct conflict with the decision of this Court in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; that it is plainly in error; and that, if permitted to stand, it would emasculate the Commission's power to issue substantive rules of general application under Section 16 of the Natural Gas Act.

1. In holding that the Commission could not, without a full evidentiary hearing, reject an application on the basis of policy standards set forth in a general rule or regulation, the decision collides with this Court's ruling in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. There, the Federal Communications Commission, pursuant to its general rule-making authority, issued an order amending its Multiple Ownership Rules for radio and television stations. Storer, a broadcaster whose ownership of seven stand-

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taining proscribed price-changing provisions have been challenged in the Ninth and Fifth Circuits. The Ninth Circuit heard argument in *Superior Oil Co.* v. *Federal Power Commission*, No. 18252, on May 6, 1963. *Sun Oil Co.* v. *Federal Power Commission*, C.A. 5, No. 20290, has been briefed and is ready for argument. In *Humble Oil & Refining Co.* v. *Federal Power Commission*, C.A. 5, No. 20616, petition for review filed June 13, 1963, the petitioner challenges the rejection of an amendatory agreement containing proscribed price-changing provisions. In that case, the court has granted a joint motion of the Commission and Humble to hold the case in abeyance until after final disposition of the present case.

ard radio and five television stations constituted, under the amended Rules, an automatic disqualification for further licensing, challenged the Rules in the court of appeals on the ground that they were in conflict with § 309 of the Communications Act, 47 U.S.C. 309, requiring (a) that a license be granted where the public interest would be served, and (b) that a hearing be held before denial of an application. The court of appeals invalidated the general order, holding (220 F. 2d 204, 208) that "any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected." In this Court, the Communications Commission argued, just as the Power Commission does here, that rules may validly give concreteness to a standard of public interest; that the right to a hearing does not apply where an applicant admittedly does not meet those standards since there would be no further facts to ascertain; and that the agency's regulations afforded applicants an opportunity to allege exceptional circumstances which might, in individual cases, warrant a waiver of the Rules (351 U.S. at 201). This Court agreed, reversing the decision below upon the following analysis (351 U.S. 202–203, 205):

> We do not read the hearing requirement * * * as withdrawing from the power of the Commission the rule-making authority necessary for the orderly conduct of its business. As conceded by Storer, "Section 309(b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that the Congress has determined are in the public interest."

> The challenged Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority. 47 U.S.C. § 154(i) and § 303(r) grant general rulemaking power not inconsistent with the Act or law.
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> * * * We read the Act and Regulations as providing a "full hearing" for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to Rules 1.361(c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as is required by § 309(b), n. 5, *supra*, would not be necesary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

Precisely the same considerations are controlling here. Under Section 1.7(b) of the Power Commission's Rules and Regulations (18 C.F.R. (Cum. Supp. 1963) 1.7(b) (App. 50–51)), respondents were free to petition for a waiver or modification of the Regulation prohibiting indefinite price-changing clauses and, by setting forth reasons sufficient on their face to provide

a basis for such relief, would have been entitled to a hearing. Similarly, they would have been granted an evidentiary hearing if at any point they had raised any substantial factual issue as to the applicability of the Regulation in the particular circumstances. See *Atlantic Refining Co.*, F.P.C. Docket No. CI62–1562, order of September 13, 1962, granting rehearing of rejection order, 27 Fed. Reg. 9362. The fact is, however, that neither respondent has ever asserted that the Regulation, if valid, would not cover, or for some reason ought not be applied to, the escalation clauses in its contract. What the Natural Gas Act does not require, any more than did the Federal Communications Act involved in *Storer,* is that the Commission hold a full evidentiary hearing in each case merely to redetermine the wisdom of its general rule or to reappraise the "legislative facts" on the basis of which that rule was adopted.

The *Storer* case also disposes of the objection that the Commission's action "precludes the possibility of effective judicial review." In *Storer,* as in the present case, a substantive rule was issued on the basis of comments, data, and views submitted by interested persons in accordance with the provisions of Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b) (App. 43–44). While the Tenth Circuit apparently concluded here that it could not determine the reasonableness of any substantive rule without any evidentiary record, this Court had no difficulty in passing upon the FCC's Multiple Ownership Rules at issue in *Storer.* See also *Transcontinent Television Corp.* v. *Federal Communications Commission,* 308 F. 2d 339

(C.A.D.C.) (rule-making record held to support rule); *Functional Music, Inc.* v. *Federal Communications Commission*, 274 F. 2d 543 (C.A.D.C.), certiorari denied, 361 U.S. 813 (stated justification held not to support rule); *cf. Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284. It is wholly immaterial that in *Storer* it was the general order promulgating the rule which was under review, whereas here it is a subsequent order applying the rule. In both cases, it is the validity of the underlying rule, either on its face or as applied, which is at issue; and in both cases the court, in deciding that issue, may review the written views and comments submitted to the Commission in connection with the rule-making proceeding.[10]

2. The other objections suggested by the court below are equally without merit. Specifically, there is no basis for the court's conclusion that the Commission's ultimate findings in support of Order Nos. 232, 232A, and 242—that the proscribed price-changing provisions are inconsistent with the "public interest"—are legally insufficient because they were not cast in the language of the statutory standards of "just and reasonable" (Sections 4 and 5) and "public convenience and necessity" (Section 7). Although the particular terminology of Sections 4, 5 and 7 was not used, it is clear that the Commission's findings were

[10] The formal record filed in these cases with the Court of Appeals did not include the written views and comments constituting the record in the rule-making proceedings which culminated in Commission Orders Nos. 232A and 242. Of course, however, the court of appeals was free to take judicial notice of the public record or to require the Commission to produce it.

based upon the appropriate statutory standards. In *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355, this Court made plain that the validity, or the justness or reasonableness, of a contract depends upon whether it adversely affects the "public interest." See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344, 345; *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 252 F. 2d 619 (C.A.D.C.), certiorari denied, 355 U.S. 904. And in many certificate proceedings, "public interest" has similarly been equated with "public convenience and necessity." See, *e.g.*, *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 24, 29, 30; *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 390–391, 392. It should be noted, moreover, that, in issuing rules of general applicability, an administrative agency is required only to give "a concise general statement of their basis and purpose" (Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003 (b)).

Equally wide of the mark is the court's conclusion that the Commission has no power to formulate general substantive rules with respect to provisions of contract. Without doubt, the Commission lacks authority to "make" contracts in the first instance. Nor can it approve, or even accept for filing, proposed rate increases which exceed the levels agreed upon by the parties. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332. As we have already noted, however (*supra*, p. 10), the Commission does have explicit authority to order the modi-

fication of existing contractual provisions which it determines to be inimical to the public interest. We see no reason why, in making that substantive determination, it may not utilize the rule-making procedures contemplated by Section 16 of the Natural Gas Act. See *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194.

3. If allowed to stand, the decision below would virtually emasculate the Commission's power to use its rule-making authority for the formulation of general legal and policy standards. It would require the Commission to deal on an individual basis, in literally hundreds of separate rate and certificate proceedings, with problems which are industry-wide in character and show little, if any, variation from case to case. To require the Commission, for example, to hold an evidentiary hearing and to consider the problems created by indefinite pricing provisions each time an application based on such a provision is submitted to it, would be to insist that a matter readily susceptible of a quasi-legislative disposition must nonetheless be litigated repeatedly—a process, we suggest, which would be without gain but at considerable cost to efficient and predictable regulation.

The importance of preserving to the Commission its power to "legislate interstitially" is well illustrated by the instant regulations outlawing "favored nation," "spiral escalation," and other unlimited price-changing provisions.[11] Experience has shown the Commis-

[11] *Two-party favored-nation clauses* provide for rate increases whenever a higher price is paid to any other supplier by the same purchaser. Under a *three-party favored-nation clause*, the price increase is triggered by a higher price paid to any other supplier by any purchaser. *Spiral escalation clauses*

sion that these provisions, which typically call for automatic price increases whenever a higher price is received by another seller in the same general area, have resulted in a flood of simultaneous rate filings which lack any substantial relationship to the economic requirements of the producer, or to other factors bearing upon a determination of the proper rate.

In addition, the interpretation and application of these highly complex clauses has created an administrative problem of formidable proportions. To determine the threshold question whether the proposed rate increase is contractually authorized, *i.e.*, whether it has been "triggered" by a higher rate under another contract, the Commission and its staff are frequently required to undertake intricate and debatable comparisons between the two contracts with respect to countless variables—*e.g.*, quantity and quality of gas, delivery pressures, gathering and compressing arrangements, etc.—before they can embark upon the true regulatory task of determining the just and reasonable rate.

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generally provide that in the event the price which the buyer receives for the gas is increased, the price concurrently paid by the buyer to the supplier under the contract shall be increased in proportion to the buyer's increase. *Redetermination clauses* provide that the price currently paid under the contract shall be subject to upward adjustment at certain specified times to reflect the average of the highest prices then paid by buyers to other suppliers for gas delivered under substantially similar terms and conditions. Other similar types of indefinite escalation clauses include bona fide offer type of favored-nation clauses, commodity-index-adjustment clauses, and renegotiation clauses. See *Pure Oil Co.*, 25 FPC 383, 388.

Still another impediment to effective regulation arises from the fact that the precise amount of the contractually permitted price increases may not be ascertainable until the level of the triggering price or prices is finally determined in a Commission rate proceeding involving that price. See, *e.g.*, *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (C.A. 10), certiorari denied, *sub nom Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.*, 350 U.S. 1005. Thus, if another seller is being paid a higher rate subject to a Commission-imposed obligation to refund in certain contingencies, the amount to which the producer would be contractually entitled for sales on any given date could not be definitively established pending the resolution of the contingencies affecting the other seller. See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 303–304.

In adopting regulations to alleviate these difficulties, the Commission has given due weight to the legitimate need for pricing flexibility in an industry where contracts customarily extend for periods of 20 years. See, *supra*, pp. 6–7. But there is no occasion at this point to elaborate upon the reasonableness of the particular rules which the Commissioner has adopted. The court below did not reach that issue. The important consideration at this juncture is that the Commission has been held to be without rule-making powers in an area which is surely vital to the performance of its regulatory responsibilities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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AUGUST 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM, 1963

Nos. 6947, 7135, and 7217

TEXACO, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Nos. 6973, 7002, and 7303

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 7179

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Alfred C. DeCrane, Jr., and James J. Flood, Jr. (P. F. Schlicher and P. R. Wimbish were with them on the briefs), for petitioner, Texaco, Inc., in Nos. 6947, 7135, and 7217.

William H. Emerson and Carroll L. Gilliam (J. P. Hammond, Thomas J. Files, Harold H. Young, Jr., and William J. Grove, and Dow, Lohnes, and Albertson, of counsel, were with them on the briefs) for petitioner, Pan American Petroleum Corporation, in Nos. 6973, 7002, and 7303.

John A. Ward, III (Phillip D. Endom, Joiner Cartwright, Herf M. Weinert, Charles F. Heidrick, J. Colbert Peurifoy, Robert E. May, Louis Flax, John T. Ketcham and May, Shannon and Morley, and Martin A. Row, of counsel, were with him on the brief), for petitioner, Sun Oil Company, in No. 7179.

Peter H. Schiff, Attorney (Richard A. Solomon, General Counsel, Howard E. Wahrenbrock, Solicitor, and Milton J. Grossman and Arthur H. Ffibourg, Attorneys, Federal Power Commission, were with him on the briefs), for respondent, Federal Power Commission.

Before MURRAH, Chief Judge, and BREITENSTEIN and HILL, Circuit Judges

BREITENSTEIN, Circuit Judge.

These seven cases present another episode in the history of the regulation by the Federal Power Commission of independent producers of natural gas subject to its jurisdiction. Basically the issue is the right of the Commission to reject summarily and without a hearing a gas-purchase contract between a producer and a pipeline company on the ground that the contract contains indefinite price-changing clauses forbidden by Commission regulations.

At the outset we are faced, in all but one of the cases, No. 7303, with the Commission's procedural objections to the right of the producers to maintain petitions for review in this court. The insistence of the parties on their procedural rights impels us to resist the temptation to go directly to the heart of the controversy.

The struggles of the Commission to administer the Natural Gas Act so as to regulate producers have been described many times in Commission reports and decisions and in court decisions. We shall review the

situation only to the extent necessary for a background to the phase of the problem with which we are concerned.

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338, 341, the Supreme Court said that the Natural Gas Act[1] did not "abrogate private rate contracts as such" and construed §§ 4 and 5 of the Act[2] as parts of a statutory scheme under which "all rates are established initially by the natural gas companies." The gas is ordinarily sold in the field by a producer to a pipeline company which transports the gas to the area of use and there sells it to a retailer who makes distribution to the ultimate consumers. The pipelines must have a committed source of gas supply sufficient to justify financing, construction, and operation. That supply is ordinarily obtained by long-term contracts of 20 years or more. The negotiation of a long-term contract presents problems of the continued fairness and adequacy of the original selling price.[3] These problems have given rise to price escalation provisions.[4] We have recognized contractual provisions for price escalation as unabrogated by the Act.[5]

[1] 15 U.S.C. § 717.

[2] 15 U.S.C. §§ 717c and 717d.

[3] Cf. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 113.

[4] These provisions take many forms such as two-party favored-nation, three-party favored-nation, periodic escalation, redetermination, and spiral escalation. For the purposes of this decision an explanation of the differences is unnecessary except, as will later be discussed, in the differentiation between definite price-changing clauses and indefinite price-changing clauses.

[5] *Cities Service Gas Producing Company* v. *Federal Power Commission*, 10 Cir., 233 F. 2d 726, 730, certiorari denied 352 U.S. 911 (adjustments based on "prevailing field price" in a

Within three months after the *Mobile* decision, the Commission gave notice in Docket No. R–153[6] of a proposed regulation to prohibit the filing of producers' contracts containing either pricing clauses tied to buyers' rates and pricing indices, or favored-nation clauses. This docket lay dormant until March 3, 1961, when the Commission issued its Order No. 232[7] declaring provisions for adjustment in price denoted as "indefinite escalation" clauses to be "inoperative and of no effect at law" in contracts tendered for filing after April 2, 1961. This order was superseded by Order No. 232–A[8], which added the following to the definition of "rate schedule" as contained in § 154.93 of the regulations:

> *Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:
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> (1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
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> (2) provisions that change a price to a specific amount at a definite date; and

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specific area); *Phillips Petroleum Company* v. *Federal Power Commission*, 10 Cir., 258 F. 2d 906, 918 (escalations tied to the "weighted average royalty rate" in a defined area); *Kerr-McGee Oil Industries, Inc.*, v. *Federal Power Commission*, 10 Cir., 260 F. 2d 602 (adjustments in ratio to pipeline company's resale rate); *Warren Petroleum Corporation* v. *Federal Power Commission*, 10 Cir., 282 F. 2d 312 (adjustments under two-party favored-nation clause).

[6] 21 Fed. Reg. 2388, April 12, 1956.

[7] 25 F.P.C. 379, 26 Fed. Reg. 1983, March 8, 1961.

[8] 25 F.P.C. 609, 26 Fed. Reg. 2850, April 6, 1961.

(3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question.

Hereafter we shall refer to contract provisions permissible under Order No. 232–A as definite price-changing clauses and to those impermissible under that order as indefinite price-changing clauses.

Pursuant to notice given on October 10, 1961, in Docket No. R–203,[9] the Commission, on February 8, 1962, issued its Order No. 242[10] which made three amendments to the regulations. Section 154.93, defining producers' rate schedules, was amended to prescribe automatic rejection of contracts containing indefinite price-changing clauses. The amendment reads:

> *Provided further,* That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above [Order No. 232–A] shall be rejected.

Order No. 242 also amended §§ 157.14 and 157.25 of the regulations so as to prohibit the consideration of contracts containing the forbidden clauses in support of a pipeline's application for a certificate of convenience and necessity.

The cases now before us attack the validity of Orders Nos. 232, 232–A, and 242. With this background we turn to the procedural questions.

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[9] 26 Fed. Reg. 9732, October 14, 1961.

[10] 27 F.P.C. 339, 27 Fed. Reg. 1356, February 14, 1962. Rehearings denied 27 F.P.C. 666.

Court review of Commission orders is governed by § 19(b) of the Act,[11] which provides that a party to a proceeding "aggrieved" by a Commission order may obtain a review in the court of appeals "for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business," or in the Court of Appeals for the District of Columbia Circuit. The Commission asserts that venue does not lie in the Tenth Circuit for consideration of the three petitions of Texaco, Inc., Nos. 6947, 7135, and 7217, because the petitioner is not located in, and does not have its principal place of business in, that circuit. Texaco is incorporated under Delaware law and allegedly has its principal place of business in Texas. Venue in the Tenth Circuit depends on the meaning to be given the word "located."

Texaco's petitions for review allege that its Tulsa Division has responsibility for Texaco's producing activities and operations in an area including Oklahoma and Kansas.[12] The Tulsa Division operations include "the negotiation of leases and exploration permits; geological and geophysical activities; the drilling of exploratory wells, and the development of productive areas; the payment of royalties and production taxes; the filing of state reports and the disposition of the production." In each case personnel of the Tulsa Division negotiated the contracts with the pipelines. That division supervises the perform-

[11] 15 U.S.C. § 717r(b).

[12] Another of Texaco's seven producing department divisions is headquartered in Denver, Colorado, and has similar responsibilities for an area including Colorado, New Mexico, Utah, and Wyoming, all states of the Tenth Circuit.

ance of the contracts by Texaco, maintains records pertaining thereto, and receives payment for the gas sold. The certificate applications were made by the Tulsa Division.

The Commission asserts that the word "located" as used in § 19(b) means the same as "resides" and refers to the state of incorporation. Oddly enough, the extensive litigation over the Natural Gas Act has not produced an answer to this simple question. Perhaps the reason is that the point concerns venue rather than jurisdiction." The Commission asserts a "long-established understanding" of the Commission and the natural-gas companies that "located" refers to the state of incorporation, and cites an impressive list of cases brought in the Third Circuit on the basis of the incorporation of the natural-gas companies, which were parties thereto, in one of the states of the Third Circuit. Texaco counters with an equally impressive list of cases wherein review was had in a circuit in which the natural-gas company was not incorporated and did not have its principal place of business. As venue may be waived, we are not impressed with this approach.

In a long line of decisions, beginning with *Shaw* v. *Quincy Mining Company*, 145 U.S. 444, 450, the Supreme Court has held that the residence of a corporation within the meaning of venue statutes is only the state of incorporation. *In Suttle, Administratrix* v. *Reich Bros. Construction Co.*, 333 U.S. 163, 166-167, the Supreme Court reviewed these cases and said that Congress has revealed a similar understanding in the enactment of special venue statutes. The presumption is that Congress was aware of the

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[11] *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 638.

applicable decisions, and its recognition of them, when it enacted the Natural Gas Act."

The parties agree that the pertinent language of § 19(b) was taken from § 313(b) of the Federal Power Act.[15] The legislative history of that section shows that "is located" was substituted for "resides."[16] The Commission says that there is no explanation of the purpose of the change. In our opinion the change is significant and the deliberate substitution of words shows a congressional intent not to narrow the provision to the state of incorporation. If Congress had so intended, it would have retained the word "resides."

The Commission urges that, unless "is located" is equated with "resides," the insertion of the phrase "principal place of business" is but an exercise in redundancy violative of the rule that all terms of a statute must be given effect. We do not agree. Congress is presumed "to have used language in accordance with the common understanding."[17] "Located"

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[14] *Shapiro* v. *United States*, 335 U.S. 1, 16. Cf. *Public Service Company of New Mexico* v. *General Electric Company*, 10 Cir., — F. 2d —, decided March 15, 1963; *United States* v. *Sanders*, 10 Cir., 145 F. 2d 458, 461.

[15] 16 U.S.C. § 825*l*(b).

[16] The first version of what ultimately developed as § 313(b) of the Federal Power Act (Part III of the Public Utilities Holding Act of 1935, Part III, Act of August 26, 1935, c. 687, § 313(b), 49 Stat. 803, 854, 860, appeared in S. 1725, 74th Cong., 1st Sess. In its briefs the Commission says that this bill provided that a person aggrieved could obtain review of a Commission order in a court of appeals "for any circuit wherein such person resides or has his principal place of business," and that a revised bill, S. 2796, contained the venue provisions now found in § 313(b). The significant modifications are that the reference point for venue is the licensee or public utility rather than the petitioner, and that the words "is located" replace "resides."

[17] *United States* v. *Wurts*, 303 U.S. 414, 417.

means having physical presence or existence in a place."[18] A corporation has physical presence or existence in the state of incorporation and in a state where it conducts substantial operations. Granting that a corporation is located in the state in which it has its principal place of business, the overlap in provisions must be for the purpose of clarity. The fact of the overlap does not detract from the effect of the substitution of "is located" for "resides." We deem the change in phraseology to be more significant than the overlap.

This conclusion does not intend that the mere legal indicia of "doing business" will support venue under § 19(b). In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 10 Cir., 142 F. 2d 943, 950–951,[19] we denied a motion to dismiss and held that the petitioners in that case had their principal places of business in Colorado, saying that the question was one "of fact to be determined in each particular case." The same principle applies here and the question of whether Texaco is located in the Tenth Circuit must be determined on the particular facts. The undenied allegations of Texaco are that it conducts extensive operations in the Tenth Circuit and has two of its seven production divisions therein. More importantly, in each of the cases the gas sold is produced

[18] Webster's New International Dictionary, 2d ed. (1959), Unabridged, defines "locate" as: "1, To designate the site or place of; * * *. 2. a. To set or establish in a particular spot or position; to station. b. To establish in a charge or office. * * *." The word "location" is defined as: "1. Act or process of locating (in various senses); fact or condition of being located, or of having position. * * *."

[19] Affirmed, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581; affirmed in part, reversed in part on other grounds, *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626.

in the Tenth Circuit and the performance of the contract occurs in the Tenth Circuit. As all matters concerned with the applications of Texaco which resulted in the orders here sought to be reviewed took place in the Tenth Circuit, Texaco is located in that circuit for the purpose of the venue provisions of § 19(b).

The Commission has moved to dismiss cases Nos. 6947, 6973, 7002, 7135, and 7179 upon the ground that in each case the petitioner is not "aggrieved" within the requirement of § 19(b). The facts in these cases divide them into two groups which must be considered separately.

In the first group are cases Nos. 7002 and 7179.[20] Each of these seeks to review and set aside Order No. 242. That order was issued as a rule of general applicability and amended certain sections of the regulations.

In moving to dismiss these cases the Commission asserts that the Act vests no jurisdiction in the courts of appeals to review orders of the Commission amending its general rules and regulations. The petitioners counter by saying that reviewability is predicated on an invasion of legal rights and that such rights of the petitioners are directly affected by Order No. 242.

The Tenth Circuit is committed to the view that § 10 of the Administrative Procedures Act[21] is inapplicable to the review of Commission orders under

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[20] No. 7179—*Sun Oil Company* v. *Federal Power Commission*—was originally filed in the Court of Appeals for the District of Columbia Circuit and was transferred to the Tenth Circuit pursuant to the provisions of 28 U.S.C. § 2112 because of the earlier petition filed in the Tenth Circuit by Pan American in No. 7002.

[21] 5 U.S.C. § 1009.

the Natural Gas Act.[11] Accordingly, the right of review is governed entirely by § 19(b) of the Natural Gas Act. That section permits review on the petition of a party aggrieved. The query is when, and in what circumstances, is a party aggrieved.

Sales of gas by producers to pipelines are initiated by private contract and those contracts are subject to review by the Commission under statutory standards. No right exists in the seller to change a rate fixed by contract unless the contract itself recognizes a right to change the rate. An order of the Commission proscribing price-changing provisions is an interference with the right to contract and a denial of a substantive right. Without considering for the moment the question of the power of the Commission to interfere with such a substantive right, those to whom the right is denied are entitled to court review of such action to test whether the action is within the statutory powers of the Commission. The problem is how this review may be had under § 19(b).

An easy and quick method of reviewing orders which affect substantive rights and which are of general applicability would aid the administration of the Act. The difficulty is that the Commission has construed § 19(b) so as to preclude any such expeditious review and the position of the Commission has been quite uniformly upheld by the courts.

In seeking reviews of orders of general applicability the petitioners rely on the decisions in *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407, and *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, in which rules of general applicability affecting substantial rights were held reviewable under other statutes. The courts of appeals have not

[11] *Amerada Petroleum Corporation* v. *Federal Power Commission,* 10 Cir., 231 F. 2d 461, 465.

applied these decisions in determining rights to review under § 19(b). Without going into the distinctions and differences which have been stated, the controlling point has been that a person is not aggrieved by a general order and cannot complain until a personal right is impinged by a special order. The Tenth Circuit, in *Amerada Petroleum Corporation* v. *Federal Power Commission*, 10 Cir., 231 F. 2d 461, declined to review orders issuing rules after the decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672. In so holding it relied heavily on *United Gas Pipe Line Co.* v. *Federal Power Commission*, D.C. Cir., 181 F. 2d 796, certiorari denied 340 U.S. 827, and that court's treatment of the *Columbia Broadcasting* case. More recently, the Fifth Circuit has sustained Commission motions to dismiss petitions seeking to review Order No. 232–A[23] and to review Order No. 242.[24] We accept these decisions as correct applications of § 19(b). Certainly the language of the statute is strained if review may be had of a negative order of general applicability by a party who has not been, and may never be, affected by the order except in a theoretical manner. Accordingly, Nos. 7002 and 7179 must be dismissed on the ground that the petitioners are not aggrieved within the meaning of § 19(b).

The second group of cases attacks special orders made under the authority of the mentioned general orders. In each instance the questioned decisions have granted the authority sought but provide that any

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[23] *Sun Oil Company* v. *Federal Power Commission*, 5 Cir., 304 F. 2d 293, certiorari denied 371 U.S. 861.

[24] *Hunt Oil Company* v. *Federal Power Commission*, 5 Cir., 306 F. 2d 878. The Third Circuit took similar action in an unreported case, *Shell Oil Company* v. *Federal Power Commission*, case No. 14058, decided July 17, 1962.

application for a rate change under an impermissible price-changing clause will be rejected.

Nos. 6947, 6973, and 7135 concern applications for certificates of convenience and necessity covering gas sales by producers to pipelines. In Nos. 6947 and 7135 the same contract is presented, one for the sale by Texaco to Lone Star Gas Company of gas produced in the Carter-Knox Field, Stephens County, Oklahoma. In No. 6973 the sale is by Pan American to Mountain Fuel Supply Company of gas from the Middle Mountain Unit Area, Sweetwater County, Wyoming. Each contract was made or amended after the effective date of Order No. 232–A and contains indefinite price-changing clauses. The Commission granted temporary authorizations in Nos. 6947 and 6973. A permanent certificate was granted in No. 7135 for the same service as that presented in No. 6947.

In each of the three cases the order of the Commission contains this provision in substantially identical language:

> Further, in the event that any of the documents comprising the listed rate schedules and supplements was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

The petitions for review in these cases are directed against the quoted provision of the respective orders. The Commission has moved to dismiss each on the ground that the petitioner is not a party aggrieved.

On the one hand the petitioners say that Order No.

232–A, as implemented by the orders containing the provision in question, has effectively nullified indefinite price-changing clauses and thus deprived petitioners of contract rights assured to them by the Act and by the *Mobile* decision. On the other hand the Commission urges that the orders sought to be reviewed in these cases do not themselves adversely affect the petitioners but only affect their rights adversely on the contingency of future administrative action.

In *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 10 Cir., 270 F. 2d 404, 407, the Tenth Circuit dismissed, on Commission motion, a petition to review a Commission order authorizing temporary service and providing that service once instituted could not be discontinued without Commission permission. Objection was made to the provision for termination of service. The dismissal was on the ground that the petitioner had not sought to terminate and, hence, was not aggrieved.[25] In *Sun Oil Company* v. *Federal Power Commission*, 5 Cir., 304 F. 2d 290, certiorari denied 371 U.S. 861, the Fifth Circuit was confronted with a situation comparable to the one here presented. Objection was made to the inclusion in an authorization for temporary service of a provision, similar to that appearing in Nos. 6947, 6973, and 7135, for the rejection of rate increases covered by impermissible price-changing clauses. The court sustained the Commission motion to dismiss saying that the clause attacked was interlocutory and not reviewable.

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[25] The court, quoting from *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 130, said: " * * * the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action."

We conclude that the provisions of the orders attacked in Nos. 6947, 6973, and 7135 do not adversely affect any right of the petitioners and, hence, the petitioners are not aggrieved within the requirement of § 19(b). That conclusion does not mean that Orders Nos. 232, 232–A, and 242 are valid or that contracts executed after the effective date of those orders are "inoperative" or "of no effect at law" when they contain indefinite price-changing clauses.

This brings us to No. 7303, in which the Commission has interposed no procedural objections to the petition for review, and to No. 7217 in which we hold that the motion to dismiss must be denied. In each of these the Commission rejected an application for a certificate of convenience and necessity on the ground that the underlying contract contained pricing provisions not permissible under § 154.93, as amended by Order No. 232–A.[26] The rejection was based on Order No. 242. As we have heretofore stated, that order provides for the rejection of applications for certificates when the underlying contract contains price-changing clauses forbidden by Order No. 232–A.

Our difficulty is immediately apparent. The summary rejection of the Texaco and Pan American contracts without a hearing deprives the court of any record upon which the rejection may be sustained, other than the general orders which are attacked. As we have noted above, the Commission has successfully maintained that these general orders are not subject

[26] No. 7217 relates to an application by Texaco for a certificate covering a sale by it to Natural Gas Pipeline Company of America of gas produced in the Camrick Southeast Field, Beaver County, Oklahoma. The application in No. 7303 is based on a contract for the sale by Pan American to Colorado Interstate Gas Company of gas produced in the Beaver Creek Field, Fremont County, Wyoming. Each contract contains indefinite price-changing clauses.

to direct court review. This bootstrap operation of the Commission, in practical effect, circumvents court review of the basic question—the propriety of indefinite price-changing clauses.

Neither sympathy for the administrative difficulties of the Commission nor recognition of its expertise in the regulation of those subject to the Natural Gas Act justifies disregard of the statutes under which the Commission operates. We find no statutory authorization for the Commission actions here attacked.

Section 16 of the Act [17] empowers the Commission to make rules and regulations to carry out the provisions of the Act but that section is not a source of power to regulate in conflict with substantive provisions of the Act.[18] The Commission asserts that the necessary authority flows from §§ 4, 5, and 7.[19]

Sections 4 and 5 relate to rates and charges and gives the Commission power to modify contracts—not to make contracts. The power to modify can be exercised only after hearing. The controlling standard is what is just and reasonable.[20]

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[17] 15 U.S.C. § 717o.

[18] Cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508. See also *Willmut Gas & Oil Company* v. *Federal Power Commission*, D.C. Cir., 294 F. 2d 245, 250, certiorari denied 368 U.S. 975, saying that § 16 does not permit the Commission to promulgate rules inconsistent with the Act and thus result in a legislative change.

[19] 15 U.S.C. §§ 717c, 717d, and 717f.

[20] Section 4, subparagraph (a), provides that all rates and changes must be just and reasonable. Subparagraph (c) requires the filing of schedules showing all rates and charges "together with all contracts which in any manner affect or relate to such rates, charges, * * * ." Subparagraph (d) forbids a change in a rate or charge without 30-days' notice to the Commission. Subparagraph (e) provides that when a new rate schedule is filed, the Commission, either on complaint or on its own initiative, but on reasonable notice may "enter upon

Section 7(c) provides that no natural-gas company "shall engage in the transportation or sale of natural gas" without a certificate of public convenience and necessity and with immaterial exceptions requires the Commission to set "for hearing" applications to obtain such certificates. Section 7(e) states that the certificate will issue if the Commission finds that the proposed service "is or will be required by the present or future public convenience and necessity."

The Commission held no hearings relative to the promulgation of Orders Nos. 232, 232–A, or 242. Nevertheless, the Commission made findings allegedly justifying such orders.[31] In summary the Commission found that indefinite price-changing clauses are "undesirable, unnecessary and incompatible with the public interest;"[32] that such contract provisions "have resulted in a flood of almost simultaneous filings" which "bear no apparent relationship to the economic

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a hearing concerning the lawfulness" thereof; that the Commission may suspend a new schedule for five months; that "after full hearings, * * * the Commission may make such orders with reference thereto as would be proper" in a § 5 proceeding; and that if the proceedings have not been concluded and an order entered at the end of the suspension period, the proposed change shall go into effect but the Commission may require a bond for refund of overpayments.

So far as material, § 5 provides that when the Commission, "after a hearing," on its own motion or on complaint, finds that a "rate, charge, or classification" or "any rule, regulation, practice, or contract" having an effect thereon, is "unjust, unreasonable, unduly discriminatory, or preferential," the Commission shall determine and fix by order "the just and reasonable rate, charge, classification, rule, regulation, practice, or contract."

[31] These findings are reported for Order No. 232, at 25 F.P.C. 380, 26 Fed. Reg. 1983; for Order No. 232–A at 25 F.P.C. 609, 26 Fed. Reg. 2850; and for Order No. 242 at 27 F.P.C. 339–340, 27 Fed. Reg. 1356.

[32] 25 F.P.C. 380, 26 Fed. Reg. 1983.

requirements of the producers who file them;" and that such filings "have created a significant portion of the administrative burdens under which this Commission is laboring today."[33]

These findings are not made in the language of the statutory standards of "just and reasonable" and "public convenience and necessity." The public interest must be related to and tested by these standards. Although the Commission is the guardian of the public interest in the administration of the Act, the Commission may not substitute its standards for the statutory standards. Additionally, if we should accept the legal sufficiency of the Commission's findings, we have no way of determining the factual basis for those findings because we have before us no record of facts to sustain them.[34] In the cases at bar the Commission has held no adversary hearings at which facts have been adduced to sustain findings which, on the basis of statutory standards, support the decisions reached. No amount of administrative expertise can supply these deficiencies.

The Commission vigorously asserts the validity of Orders Nos. 232, 232-A, and 242 as orders of general application within Commission power which are desirable and preferable to a case-by-case approach to the regulatory problems. At the same time the Commission with equal vigor says that the orders are

[33] 27 F.P.C. 340, 27 Fed. Reg. 1357.

[34] The Commission's reliance on its decision in the case of *The Pure Oil Company*, 25 F.P.C. 383, is not helpful. The Commission there held that indefinite escalation provisions are, in general, contrary to the public interest. The Commission order was affirmed on review, *Pure Oil Company* v. *Federal Power Commission*, 7 Cir., 299 F. 2d 370, but the court did not discuss the problems with which we are concerned. In any event a record made in that proceeding is not dispositive of the issues now under consideration.

reviewable only on a case-by-case basis after rejection of a particular contract containing clauses impermissible under the general orders. Such a divided approach to a basic and difficult problem cannot throw a cloak of conclusive validity over general orders. If general orders are not themselves reviewable and if special orders based thereon are not reviewable when the result falls short of the denial of a presently asserted substantive right, then those general orders are only of an advisory nature and neither forbid the inclusion in contracts of indefinite price-changing clauses nor justify the rejection, on the sole ground of violation of general regulations, of contracts containing such clauses.

The Commission argues that in making the challenged orders it was "legislating interstitially, as contemplated by the Act." Although the "filling in the interstices of the Act" may be performed through a "quasi-legislative promulgations of rules,"[35] administrative officers must keep within the bounds of their administrative powers,[36] which are limited by the scope of the statute.[37] In *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617–618, the Supreme Court said:

> * * * not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. * * * For

[35] *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194, 202.

[36] *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236.

[37] *Federal Communications Commission* v. *American Broadcasting Co., Inc.*, 347 U.S. 284, 290.

> the ultimate question is what has Congress commanded * * *.

Under the Natural Gas Act and the *Mobile* decision, rates and charges for the sale of gas are initially prescribed by private contract and may be increased only in accordance with contract provisions. Contracts establishing such rates and charges and providing for changes therein may be modified by the Commission only after hearing and then only by the application of the standards of "just and reasonable" and "public convenience and necessity." The summary rejection of applications based on contracts containing price-changing clauses, of which the Commission does not approve, deprives the natural-gas companies of their statutory right to a hearing, ignores the statutory standards, and precludes the possibility of any effective judicial review.

Perhaps in some regards the Commission may "legislate interstitially" but in our opinion it may not do so when its action results in the denial of substantive rights. The horrendous consequences of such actions are well described in *Hunt* v. *Federal Power Commissions*, 5 Cir., 306 F. 2d 334, 342–345, and need not be repeated here. Within its constitutional powers Congress may legislate on substantive rights without hearings and findings. The Commission has attempted to usurp that congressional power. No claim of administrative need or of frustration in the performance of its duties can make up for the lack of statutory authority.

We are deciding only the cases before us. The problems of area pricing are not presented here. In our opinion Order No. 242 is void and without effect. Orders Nos. 232 and 232-A are in a different category. As advisory declarations of Commission policy they determine no rights. At the same time those

orders do not, and cannot, invalidate either retroactively or prospectively price-changing clauses in a gas-sale contract between a producer and a pipeline and are no justification for the rejection, without hearing, of a rate or charge based on such clauses.

For the reasons stated the motions to dismiss Nos. 6947, 6973, 7002, 7135, and 7179 are sustained and those cases are dismissed. The motion to dismiss No. 7217 is denied. The orders of the Commission in Nos. 7217 and 7303 are set aside and held for naught and the cases are remanded for further consideration in accordance with the views expressed in this opinion.

APPENDIX B

JUDGMENT

Fifth Day, May Term, Monday, May 20th, 1963

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

These causes came on to be heard and were argued by counsel.

On consideration whereof, for the reasons stated in the opinion of this court, the motions to dismiss cases Nos. 6947, 6973, 7002, 7135 and 7179 are sustained and these cases are dismissed out of this court.

The motion to dismiss case No. 7217 is denied.

The orders of the Commission in Nos. 7217 and 7303 are set aside and held for naught and the cases are remanded for further consideration in accordance with the views expressed in the opinion of the court.

APPENDIX C

1. The Administrative Procedure Act, Section 4, 60 Stat. 238, 5 U.S.C. 1003, provides as follows:

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any

manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

2. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides, in pertinent part, as follows:

SEC. 4 (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other

respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or

formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall

give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. § 717 d(a)]

* * * * * *

SEC. 7 * * *

(c) [*] No natural-gas company or person which will be a natural-gas company upon com-

[*] Subsection 7 (c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H.R. 5249], 56 Stat. 83, 84.

pletion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a cer-

tificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

* * * * *

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be

filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717*o*]

* * * * * *

SEC. 19 * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction,

which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new finding, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [52 Stat. 831 (1938), as amended, 15 U.S.C. § 717*r*]

* * * * *

3. The rules and regulations of the Federal Power Commission, as amended, 18 C.F.R. (Cum. Supp. 1963), provide in pertinent part as follows:

Section 1.7 * * *

(b) *For issuance, amendment, waiver, or repeal of rules.* A petition for the issuance,

amendment, waiver, or repeal of a rule by the Commission shall set forth clearly and concisely petitioner's interest in the subject matter, the specific rule, amendment, waiver, or repeal requested, and cite by appropriate reference the statutory provision or other authority therefor. If a rate filing is accompanied by a request for waiver pursuant to this section the thirty-day notice period provided in section 4(d) of the Natural Gas Act and section 205(d) of the Federal Power Act shall begin to run if and when the Commission grants the request. Such petition shall set forth the purpose of, and the facts claimed to constitute the grounds requiring, such rule, amendment, waiver, or repeal, and shall conform to the requirements of §§ 1.15 and 1.16. Petitions for the issuance or amendment of a rule shall incorporate the proposed rule or amendment.

* * * * *

Section 154.93 Rate schedule [for independent producers] defined.

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes, levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question: *Provided further,* That any contract executed on or after April 2, 1962, containing price-changing provisions other than the permissible provisions set forth in the proviso next above shall be rejected.

* * * * *

Section 157.14 [relates to pipeline application] Exhibits.

(a) *To be attached to each application.* * * * all exhibits specified shall accompany each application when tendered for filing.

* * * * *

(10) *Exhibit H—Total gas supply data.* A statement of the total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and the services proposed, together with:

* * * * *

(v) A conformed copy of each gas purchase contract upon which applicant proposes to rely: * * * *Provided further, however,* That any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains

any price-changing provision other than those defined as permissible in § 154.93 of this chapter. * * *

Section 157.25 Necessary exhibits.

There shall be filed with the application [of a producer] as a part thereof the following exhibits:

* * * * *

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24 (b); *And provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. On or after April 2, 1962, the application shall be rejected if any contract submitted in support thereof contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter.

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